Supreme Court, U.S.
FILED

No. 06-061082

FEB 01 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Commonwealth of Virginia

February 1, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	7
I. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS	8
Federal Cases	9
State Cases	10
II. THE DECISIONS OF THE VIRGINIA SUPREME COURT AND OF THE NINTH CIRCUIT ARE FUNDAMENTALLY FLAWED	15
A. This Court Should Clarify that a Search Incident to Arrest is Valid Under the United States Constitution if the Arrest is Based on Probable Cause	15
B. The Exclusionary Rule Should Not be Extended, as a Matter of Constitutional Law, to Vindicate State Statutes	18
C. The Virginia Supreme Court and the Ninth Circuit's Minority View Decisions are Fundamentally Flawed	21
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Accord Ryan v. County of DuPage,
45 F.3d 1090 (7th Cir. 1995) 23, 24

Anderson v. Haas,
341 F.2d 497 (3rd Cir. 1965) 10

Archie v. City of Racine,
847 F.2d 1211 (7th Cir. 1988) 20

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 5, 6, 7, 17, 18, 19, 21, 22

Bingham v. City of Manhattan Beach,
341 F.3d 939 (9th Cir. 2003) 13

Braxton v. United States,
500 U.S. 344 (1991) 13

Brinegar v. United States,
338 U.S. 160 (1949) 7, 16

California v. Greenwood,
486 U.S. 35 (1988) 15, 16, 23

California v. McKay,
41 P.3d 59 (Cal. 2002) 10, 12, 13, 20, 23

Colorado v. Hamilton,
666 P.2d 152 (Colo. 1983) 7

Devenpeck v. Alford,
543 U.S. 146 (2004) 7

Elkins v. United States,
364 U.S. 206 (1960) 15, 23

Gordon v. Degelmann,
29 F.3d 295 (7th Cir. 1994) 10, 24

TABLE OF AUTHORITIES – Continued

Page

Hudson v. Michigan,
126 S. Ct. 2159 (2006) 19

Jackson v. Virginia,
443 U.S. 307 (1979) 21

Knight v. Jacobson,
300 F.3d 1272 (11th Cir. 2002) 10

Knowles v. Iowa,
525 U.S. 113 (1998) 5, 6, 21, 22

Lovelace v. Virginia,
522 S.E.2d 856 (Va. 1999) 6, 14

Maine v. Jolin,
639 A.2d 1062 (Me. 1994) 8

Mapp v. Ohio,
367 U.S. 643 (1961) 18

Massachusetts v. Lyons,
492 N.E.2d 1142 (Mass. 1986) 8, 11

Michigan v. DeFillippo,
443 U.S. 31 (1979) 12, 22, 23, 24

Michigan v. Hamilton,
638 N.W.2d 92 (Mich. 2002) 8

Minnesota v. Martin,
253 N.W.2d 404 (Minn. 1977) 20

New Mexico v. Bricker,
134 P.3d 800 (N.M. App.),
cert. granted, 136 P.3d 569 (N.M. 2006) 20

North Carolina v. Eubanks,
196 S.E.2d 706 (N.C. 1973) 11

Ohio v. Droste,
697 N.E.2d 620 (Ohio 1998) 7, 11

TABLE OF AUTHORITIES – Continued

Page

Sanchez-Llamas v. Oregon,
126 S. Ct. 2669 (2006) 20

Texas v. Brown
460 U.S. 730 (1983) 16

United States v. Bell,
54 F.3d 502 (8th Cir. 1995) 9, 11, 12

United States v. Caceres,
440 U.S. 741 (1979) 21

United States v. Campos,
105 Fed. Appx. 184 (9th Cir. 2004)
(unpublished) 13, 14

United States v. Di Re,
332 U.S. 581 (1948) 12, 22, 23, 24

United States v. Donovan,
429 U.S. 413 (1977) 20, 21

United States v. Miller,
452 F.2d 731 (10th Cir. 1971) 9

United States v. Mota,
982 F.2d 1384 (9th Cir. 1992) 12, 13, 22

United States v. Robinson,
414 U.S. 218 (1973) 7

United States v. Van Metre,
150 F.3d 339 (4th Cir. 1998) 9, 14

United States v. Walker,
960 F.2d 409 (5th Cir. 1992) 9, 18, 23

United States v. Watson,
423 U.S. 411 (1976) 7

United States v. Wright,
16 F.3d 1429 (6th Cir. 1994) 9, 16, 23

TABLE OF AUTHORITIES – Continued

Page

Vargas-Badillo v. Diaz-Torres,
114 F.3d 3 (1st Cir. 1997) 10

CONSTITUTIONAL PROVISIONS

U.S. Const.
amend. IV 1, 2, 5, 6, 7, 8, 11, 12, 14, 15, 16, 17, 18

STATUTES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 10

Iowa Code § 805.16 7

Kentucky Rev. Stat. § 431.015 7

Nebraska Rev. Stat. § 29-435 7

New Mexico Stat. § 66-8-123 7

Ohio Rev. Code § 2935.26 7

Virginia Code § 18.2-11 4

Virginia Code § 18.2-95 17

Virginia Code § 18.2-96 17

Virginia Code § 18.2-266 3

Virginia Code § 18.2-272 4

Virginia Code § 19.2-74 ..... 3, 4, 6, 7, 14, 17, 19

Virginia Code § 19.2-82 3

Virginia Code § 19.2-250 17

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996) 15, 23

PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

This Petition concerns whether the Fourth Amendment requires suppression of evidence obtained when a police officer makes an arrest based on probable cause, but violates state law in making the arrest. When confronted with this situation, the overwhelming majority of the States and federal Circuits have held that a failure to follow state law in making an arrest does not require suppression. In other words, a violation of a state statute does not implicate the United States Constitution. However, a minority of courts, including the Supreme Court of Virginia in the decision below, have held that when an officer arrests with probable cause but violates state law, the Fourth Amendment requires suppression of evidence seized incident to that arrest. Put another way, they hold a violation of a state statute triggers suppression under the United States Constitution.

This Petition presents an ideal vehicle for this Court to resolve a deep and mature conflict among the lower courts concerning a recurring issue. Certiorari should be granted.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006). It is reprinted in the Appendix at 1. The *en banc* decision of the Court of Appeals of Virginia is published. *See Moore v. Commonwealth*, 622 S.E.2d 253 (Va. App. 2006) (*en banc*). It is reprinted in the Appendix at 12. Finally, the panel decision of the Court of Appeals of Virginia is also published as *Moore v. Commonwealth*, 609 S.E.2d 74 (Va. App. 2005). That decision can be found in the Appendix at 35.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *Virginia Code* § 19.2-74 provides, in pertinent part:

> A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.
>
> Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT OF THE CASE

1. Two police detectives stopped David Lee Moore after they observed him driving on a suspended license in Portsmouth, Virginia. *App.* 1. Under state law, driving on a suspended license is a Class 1 misdemeanor, which carries a maximum punishment of one year in jail and a $2,500 fine. *Virginia Code* §§ 18.2-11, 18.2-272. Moore was arrested and, shortly thereafter, was searched incident to the arrest. The search yielded 16 grams of crack cocaine and $516 in cash. Moore was charged with possession of cocaine with the intent to distribute. Prior to his trial, his attorney filed a motion to suppress, alleging, among other things, that his rights under the United States Constitution were violated. *App.* 2.

2. At the suppression hearing, Moore conceded that the traffic stop itself was proper, but argued that under Virginia law he should have been released on a summons rather than being subjected to a full custodial arrest. Moore contended that, because he should not have been arrested under Virginia law, any evidence derived from the search incident to arrest should have been suppressed. The trial court denied the motion, holding that the search did not violate the United States Constitution or any Virginia law governing misdemeanor arrests. *App.* 2. Moore was convicted and sentenced to serve five years in prison, with one year and six months of that sentence suspended. *App.* 2.

3. Moore appealed to Virginia's intermediate appellate court. A divided three-judge panel reversed. The panel majority observed that under *Virginia Code* § 19.2-74, the officers should have issued a summons for the misdemeanor offense instead of effecting a full custodial arrest.

Since state law precluded a custodial arrest and required the issuance of a summons, the search incident to the arrest was improper. *App.* 38-39. The panel observed that, although *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (violation of seat belt law did not preclude full custodial arrest) and *Knowles v. Iowa*, 525 U.S. 113 (1998) (where traffic citation issued, doctrine of search incident to arrest did not apply because interests that justified search incident to arrest were not present) did not compel this outcome, suppression was "a logical and necessary extension of the decision in *Knowles*." *App.* 44. A dissenting judge, however, reasoned that "[b]ecause Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution." *App.* 49. The dissent further concluded that "it is clear that the Fourth Amendment to the United States Constitution is not violated as a result of a state law violation." *App.* 49.

4. Virginia obtained a rehearing *en banc* by the intermediate appellate court. By a vote of 7-4, the *en banc* court affirmed the conviction. The *en banc* court concluded that the constitutional legitimacy of an arrest under the National Constitution hinged on whether the officers had probable cause. *App.* 20. Moore's arrest was unquestionably based on probable cause. *App.* 20-21. The court reasoned that the presence of probable cause is an issue that must be "determined separate and apart from whether an arrest violates a state statute." *App.* 22. Finally, the *en banc* court held that the suppression of the evidence was unwarranted, since the Fourth Amendment did not compel suppression for the mere violation of a state statute. *App.*

25-26. The dissenting judges reiterated the reasoning set forth in the panel decision. *App.* 27-34.

5. Moore appealed to the Supreme Court of Virginia, arguing that "the Court of Appeals [of Virginia] *en banc* erred in holding that his 'arrest and search did not violate the Fourth Amendment.'" *App.* 3. That tribunal, by unanimous opinion, held that the search of the defendant, based upon a constitutionally unassailable arrest, nevertheless "was not consistent with the Fourth Amendment." *App.* 11. The Supreme Court of Virginia began by examining this Court's decisions in *Knowles* and *Atwater* as well as *Lovelace v. Virginia*, 522 S.E.2d 856 (Va. 1999), a decision interpreting the United States Constitution. The Virginia Supreme Court observed that *Virginia Code* § 19.2-74, unlike the statutory provision at issue in *Atwater*, did not authorize the officers to make a custodial arrest of Moore. *App.* 7. After analyzing the cases, the lower court concluded that

> the officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment.

App. 11. In other words, the Supreme Court of Virginia held that the Fourth Amendment compelled suppression of the evidence because of the violation of a state statute. This Petition follows.

REASONS FOR GRANTING THE PETITION

"In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004) (citing *United States v. Watson*, 423 U.S. 411, 417-424 (1976) and *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)). Once there is probable cause to arrest and an arrest has occurred, the defendant can constitutionally be searched incident to that arrest. *United States v. Robinson*, 414 U.S. 218 (1973). Officers may arrest even for a "very minor criminal offense." *Atwater*, 532 U.S. at 354. In other words, officers act reasonably under the United States Constitution if they arrest upon probable cause. This standard rests on the text of the Fourth Amendment, historical practice and the jurisprudence of this Court.

Supplementing the probable cause standard, States have enacted a wide range of procedural statutes that govern the authority of police officers to arrest. A number of States have enacted statutes similar to *Virginia Code* § 19.2-74. *See Iowa Code* § 805.16 (mandating release on a summons for certain offenses); *Ohio Rev. Code* § 2935.26 (same); *Kentucky Rev. Stat.* § 431.015 (same); *Nebraska Rev. Stat.* § 29-435 (same); *New Mexico Stat.* § 66-8-123 (same). It is also common for some States to restrict the authority of certain types of investigators to make arrests. *See, e.g., Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (discussing restricted authority of liquor control investigators). Most States set territorial limits for an officer's authority to arrest. *See, e.g., Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (addressing whether evidence seized by police outside the territorial limit of their authority

should be suppressed); *Maine v. Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (same); *Michigan v. Hamilton*, 638 N.W.2d 92, 97-98 (Mich. 2002) (same). Finally, States have enacted a wide variety of procedural requirements that govern arrests. *See, e.g.*, *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (addressing whether violation of state procedural statute that afforded defendant an opportunity to appear and contest the arrest warrant requires suppression).

Because the Fourth Amendment to the United States Constitution imposes one standard for arrests and state law frequently provides for additional strictures, it is not unusual for state and federal courts to be confronted with the situation where a police officer has probable cause to arrest as required by the Fourth Amendment, but violates a state law governing arrests. At issue here is whether the Fourth Amendment requires the suppression of evidence when that occurs. The Virginia Supreme Court held that it does, and is joined by the Ninth Circuit in that conclusion. Five federal courts of appeals and four state supreme courts have reached the directly opposite conclusion. Certiorari is warranted to resolve this conflict over a recurring and important issue of constitutional law.

I. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

The Fourth, Fifth, Sixth, Eighth and Tenth Circuits, as well as highest state courts in California, Massachusetts, North Carolina and Ohio, have concluded that the Fourth Amendment does not require the suppression of evidence seized incident to an arrest founded upon probable

cause when the arrest was conducted in violation of a state statute governing arrests.

Federal Cases:

- *United States v. Van Metre*, 150 F.3d 339, 347 (4th Cir. 1998) (confessions were admissible even though the arrest violated Tennessee law, which required police to obtain a fugitive of justice warrant; at the time of the arrest the officers had three valid warrants);

- *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (arrest for operating a bicycle without a headlight violated Iowa law but not the United States Constitution because it was based on probable cause);

- *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir. 1994) (stricter requirements of Tennessee law for warrantless arrests irrelevant where officers had probable cause; therefore, suppression of drug evidence seized from defendant's rental car not required);

- *United States v. Walker,* 960 F.2d 409, 415-17 (5th Cir. 1992) (methamphetamine need not be suppressed if officers had probable cause to arrest; whether arrest violates Texas law irrelevant for purposes of constitutional analysis);

- *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (under state law, officers should not have arrested defendant for a misdemeanor that did not occur in the officers' presence; however, since arrest was founded upon probable cause, suppression of sawed-off shotgun was not required).

Federal courts have reached similar results in the strongly analogous context of certain actions under 42 U.S.C. § 1983. In each case, the court rejected the plaintiff's argument that an arrest that was improper under state law rendered the arrest unconstitutional under the Fourth Amendment. *See Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002) (arrest for misdemeanor assault that did not occur in officer's presence violated state law but not federal law; § 1983 lawsuit was dismissed because "[t]here is no federal right not to be arrested in violation of state law."); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (§ 1983 relief unwarranted because officers acted with probable cause; Puerto Rico rule of court prohibiting arrest for misdemeanors that do not occur in the officer's presence did not affect constitutional standard); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (fact that defendant was entitled to a hearing under Illinois law to challenge his removal as a trespasser was irrelevant; officers did not face § 1983 liability when their arrest was made with probable cause); *Anderson v. Haas*, 341 F.2d 497, 498-99 (3rd Cir. 1965) (in civil rights action, district court erroneously concluded that validity of officer's arrest hinged on state law).

State Cases:

- *California v. McKay*, 41 P.3d 59, 65-72 (Cal. 2002) (defendant's arrest for riding a bicycle in the wrong direction on a residential street violated state law, but because arrest was based on probable cause it did not violate the United States Constitution);

- *Droste*, 697 N.E.2d at 623 (liquor control officers lacked statutory authority to arrest in this specific situation but suppression was unwarranted because officers had probable cause to arrest);

- *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (defendant's arrest was improper under state law because he was not provided with notice to challenge misdemeanor complaint; however, suppression of witness's identification must be denied because the arrest was made with probable cause);

- *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (misdemeanor offense of driving under the influence did not occur in officer's presence and, therefore, violated state law; nevertheless, suppression was not warranted because the officer acted with probable cause and thereby satisfied the National Constitution).

The reasoning of these courts is exemplified by the decision in *Bell,* a case almost identical to the case at bar. In *Bell*, the defendant was arrested for riding a bicycle without a headlight. The search incident to arrest yielded cocaine. *Bell,* 54 F.3d at 503. The district court granted the defendant's motion to suppress, reasoning that the arrest contravened Iowa law. An Iowa statute required the issuance of a citation for such offenses, rather than a custodial arrest. *Id.* The Eighth Circuit reversed. The court reasoned that "states may impose rules for arrests, searches and seizures that are more restrictive than the Federal Constitution," but these "state law violations do not necessarily offend the Federal constitution." *Id.* at 504. In the context of arrests, the court observed that "an arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause." *Id.*

Therefore, the district court erred when it looked to a state statute in assessing the Constitutional validity of the defendant's arrest. *Id.*

The California Supreme Court reached the same conclusion in *McKay*. In *McKay*, the defendant was arrested for operating a bicycle in the wrong direction on a residential street. 41 P.3d at 63. The search incident to that arrest yielded a baggie of methamphetamine. *Id.* The defendant sought the suppression of this evidence, contending that it violated California law. *Id.* After an extensive analysis of this Court's decisions, the California Supreme Court concluded that this Court had never held that a violation of state law rendered an arrest illegal under the United States Constitution. *Id.* at 66-68. The Court further observed that "[c]onstitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules." *Id.* at 69. Finally, the Court noted the strong consensus of opinion from other courts that have examined this issue. *Id.* at 68-69.

In contrast, the Ninth Circuit and the court below have concluded that when an arrest violates state law, the Constitution requires suppression. In *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1992), the Ninth Circuit held that counterfeit currency obtained during a search incident to arrest must be suppressed because arrest for operating a business without a license was impermissible under California law. The court concluded that this Court's prior decisions, particularly *United States v. Di Re*, 332 U.S. 581 (1948) and *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979), compelled suppression of the evidence. The court acknowledged that its decision conflicted with that of

other circuits. *Id.* at 1387-88. The court nonetheless held that the violation of California law rendered the defendant's arrest "unreasonable, and thus unlawful, under the Fourth Amendment." In 2003, in *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 950 (9th Cir. 2003), the Ninth Circuit affirmed the ongoing validity of *Mota*.

The need to resolve this conflict among the lower courts is especially pressing because in Virginia and California there is a direct conflict between the States' highest courts and the federal courts of appeals with jurisdiction over those States. This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The practical difficulties and arbitrariness created by such conflicts are manifest. For example, when a California law enforcement officer has probable cause to arrest a suspect but violates a California statute in the process, whether the evidence seized incident to arrest is suppressed depends on which Sovereign prosecutes. If the United States prosecutes, the suspect can successfully argue that the evidence must be suppressed on constitutional grounds; if California prosecutes, the evidence would be admitted. *See Mota*, 982 F.2d at 1387; *McKay*, 41 P.3d 65-72.

The Ninth Circuit explicitly recognized this possibility in *United States v. Campos*, 105 Fed. Appx. 184 (9th Cir. 2004) (unpublished). While ordering evidence suppressed because the defendant's arrest for driving on a suspended license violated California law, the court of appeals acknowledged that, under the California Supreme Court's decision in *McKay*, the evidence would not have been

suppressed if the prosecution had been brought in state court. *Id.* In Virginia, the situation is the reverse. The evidence would be suppressed in state court under the decision below, but would be admitted in a federal prosecution. *See Van Metre*, 150 F.3d at 347.

This case provides the Court with an ideal vehicle through which to resolve this conflict among the lower courts. First, it was undisputed that the officers in this case had probable cause to conclude that respondent had committed a crime, and that the evidence at issue was seized incident to the arrest for that crime. Therefore, subtracting *Virginia Code* § 19.2-74 from the equation, the arrest would have been proper under settled federal law. Second, it is clear that the Virginia Supreme Court's decision below was based exclusively on federal law. *See App.* 11 ("the search of the defendant was not consistent with the Fourth Amendment"). Although the lower court discussed a state case, *Lovelace,* that case centered exclusively on the United States Constitution. Indeed, in *Lovelace*, the Court concluded that "the search of Lovelace violated his Fourth Amendment rights." *Lovelace*, 522 S.E.2d at 857. Finally, there is no benefit to allowing further development in the lower courts. Most of the federal courts of appeals and a number of States have already spoken on the issue; the conflict will not disappear.

II. THE DECISIONS OF THE VIRGINIA SUPREME COURT AND OF THE NINTH CIRCUIT ARE FUNDAMENTALLY FLAWED.

A. This Court Should Clarify that a Search Incident to Arrest is Valid Under the United States Constitution if the Arrest is Based on Probable Cause.

This Court has "never taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." 1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996). It follows that, if the arrest is valid, the search incident to that arrest is also constitutionally valid, regardless of any additional strictures of state law. However, the lower court and the Ninth Circuit seem to believe that the Constitution requires both probable cause and a strict compliance with any applicable state laws.

This view conflicts with this Court's holdings in *Elkins v. United States*, 364 U.S. 206 (1960), and *California v. Greenwood*, 486 U.S. 35 (1988). In *Elkins*, the Court examined the admissibility of wiretap evidence obtained by state officers. 364 U.S. at 206-07. The Court concluded that, whether the officers who illegally seize evidence are state or federal officers, "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 223-24. In *Greenwood*, this Court rejected the defendant's argument "that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law." 486 U.S.

at 43. This Court acknowledged that States could impose more stringent constraints on the police than those imposed by the United States Constitution, but noted that it "had never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.*

As the Sixth Circuit observed, "it would be incongruous to use state law to determine whether the exclusionary rule should apply to a search incident to arrest, but to use federal law to determine whether the exclusionary rule should apply to all other searches." *Wright*, 16 F.3d at 1436. Adopting the majority view on the issue presented in this case would thus preserve the consistency of this Court's Fourth Amendment jurisprudence.

Furthermore, the probable cause standard, unfettered by further state law requirements, has the virtue of simplicity and clarity. *Texas v. Brown,* 460 U.S. 730, 742 (1983) (noting that "probable cause is a flexible, commonsense standard."); *Brinegar,* 338 U.S. at 176 ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement.").

Constitutionalizing the myriad state rules governing arrests would needlessly inject another layer of complexity to the constitutional law of arrest. In contrast to the straightforward probable cause standard, the application of the holding below will be difficult to apply in practice. It will not always be clear under state misdemeanor summons statutes whether the crime at issue is a misdemeanor or a felony. For example, under Virginia law, theft

of an item worth more than $200 is a felony, *Virginia Code* § 18.2-95, for which an officer may effect a full custodial arrest. On the other hand, theft of an item valued at less than $200 is petit larceny, a Class 1 misdemeanor, *Virginia Code* § 18.2-96, for which a summons is presumptively required under state law. *Virginia Code* § 19.2-74. The value of an item may not be immediately apparent to the arresting officer. Or an officer may be mistaken about the scope of one of the exceptions to the misdemeanor summons rule and improperly arrest a suspect under state law. Finally, statutes linking the power to arrest to jurisdictional boundaries within a State often have their own complexities. *See, e.g.*, *Virginia Code* § 19.2-250 (officers' jurisdiction extends to one mile beyond their jurisdictional boundary, "except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town."). For investigations that cross state lines, officers would have to determine which State's law of arrest should govern.

In *Atwater*, this Court reiterated the value of the bright line rule governing arrests, noting that

> we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.

532 U.S. at 347. The probable cause standard also has the virtue of uniformity in all state and federal courts. It would be anomalous for the scope of National Constitutional protection to evolve with jurisdictional boundaries. There is also no reason why federal prosecutions should be made to depend on the fortuity of the arrest locale.

B. The Exclusionary Rule Should Not be Extended, as a Matter of Constitutional Law, to Vindicate State Statutes.

The court below and the Ninth Circuit appear to believe that the Constitution requires the exclusion of evidence whenever police officers make a mistake under a state law that governs arrests. In other words, those tribunals elevate a violation of state law into a constitutional violation which in turn triggers the suppression remedy.

This view of the exclusionary rule is mistaken. "[T]he exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law." *Walker*, 960 F.2d at 415. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). Absent the state statute at issue, Moore's arrest would have been proper under settled constitutional law. *Atwater*, 532 U.S. at 354-55. Moore conceded at trial that the traffic stop was proper and that he had a suspended license. The officers unquestionably had probable cause to arrest for the misdemeanor offense of driving on a suspended license. Requiring suppression under such circumstances would inappropriately expand the scope of the exclusionary rule beyond its doctrinal foundation of vindicating federal rather than State interests.

This Court recently noted that suppression of evidence should be a last resort, not a first impulse. *Hudson v. Michigan*, 126 S. Ct. 2159, 2613 (2006). Among other things, the exclusionary rule exacts "substantial social costs," including the release of dangerous criminals. *Id.* at 2163. Here, in addition to the habitual costs of the exclusionary rule, expanding the rule to vindicate state statutes that may never have contemplated exclusion would impose additional costs to the citizenry at large: such a rule would ultimately discourage state legislatures from enacting measures, such as *Virginia Code* § 19.2-74, that benefit the public at large. A state legislature may enact a statute as a guideline for law enforcement rather than with any intent to trigger the suppression of probative evidence. A State's imposition of a jurisdictional boundary on a police officer's arrest power, for example, is not likely to stem from a desire to assist criminals in avoiding prosecution by suppressing relevant evidence. More likely, the state legislature simply seeks to ensure amicable relations between neighboring jurisdictions.

States, consistent with our federal scheme of government, are free to impose additional strictures upon their officers. However, the interpretation and remedies for violating those strictures should be left to the States that created these measures. If a State wishes to require the suppression of evidence seized outside of an officer's jurisdictional boundary, it can so provide.[1] If a State

[1] The probable cause standard and other constitutional due process requirements provide substantial protection to the citizenry, regardless of additional protections found in state law. Furthermore, as this Court noted in *Atwater*, the Nation is not "confronting anything like an epidemic of unnecessary minor-offense arrests" owing, in part, to the "good sense" of law enforcement who have neither the desire nor the

(Continued on following page)

concludes that suppression is the appropriate remedy for an officer's failure to release a suspect on a summons, the State can so declare. *See Minnesota v. Martin*, 253 N.W.2d 404, 405-06 (Minn. 1977); *New Mexico v. Bricker*, 134 P.3d 800, 805-808 (N.M. App.), *cert. granted*, 136 P.3d 569 (N.M. 2006). A State may conclude that suppression is the appropriate remedy, that a civil lawsuit or an administrative proceeding is the proper remedy, or that no remedy is required. The State that drafted the statute should have the prerogative of assessing the gravity of the violation of its own law and the appropriateness of a particular remedy. The sledgehammer of suppression is not constitutionally compelled when officers violate a state law governing arrests.

Our Constitution recognizes the distinct sovereignty of State and federal governments. If "state law can transform constitutional police conduct into its opposite," it would "unravel our federal system, since treating a state law as a violation of the Constitution 'is to make the federal government the enforcer of state law.'" *McKay*, 41 P.3d at 65 (quoting *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988)).

Furthermore, it is difficult to see why suppression should automatically follow for a violation of state statutes when suppression is not automatically triggered by violations of federal statutes, treaties, or regulations. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679-82 (2006) (suppression not an appropriate remedy for a violation of the Vienna Convention); *United States v. Donovan*, 429

---

resources to make full custodial arrests in every possible instance. 532 U.S. at 353.

U.S. 413, 432 n.22 (1977) (denying exclusion for violation of wiretapping statute); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (violation of I.R.S. eavesdropping regulation did not require suppression).

To be sure, the *application* of federal constitutional law standards intersects in a number of contexts with state law. For example, a particular act may constitute a crime in one State but not in another. Therefore, an officer who has probable cause to believe that a suspect has violated a particular statute may properly arrest in the State that has enacted the statute, but may not arrest in a State where that statute does not exist. State law operates as a factual backdrop to the application of the standard mandated by the United States Constitution. However, the probable cause standard itself is a creature of the United States Constitution rather than of state law. Another illustration of this phenomenon are the cases under *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, state law defines the crime, but the Due Process standard flows from the Constitution itself. That standard, derived independently of the underlying law, is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

C. The Virginia Supreme Court and the Ninth Circuit's Minority View Decisions are Fundamentally Flawed.

The Virginia Supreme Court and the Ninth Circuit incorrectly applied this Court's jurisprudence. The decision of the Virginia Supreme Court relied on this Court's decisions in *Atwater* and *Knowles*. However, those cases

did not resolve the question presented in this case. In *Atwater*, this Court held that a full custodial arrest for a seatbelt violation did not violate the United States Constitution. 532 U.S. at 354-55. While the Texas statute at issue authorized the officer to make a full custodial arrest, the decision did not turn on that fact. *Id.* at 354. Given the background of state law in *Atwater*, the issue presented in the case at bar was not present. Similarly, in *Knowles*, this Court held that the Constitution could not support a search incident to citation, because the concerns underlying the search incident to arrest – officer safety and the need to preserve evidence for trial – do not apply to a situation where the officer issued a citation. 525 U.S. at 118-19. In the case at bar, however, the officers were not issuing a citation; they made a full custodial arrest.

As noted above, the Ninth Circuit's decision in *Mota,* 982 F.2d at 1387-88, erroneously relied on *Di Re*, 332 U.S. 581 and *DeFillippo*, 443 U.S. 31. Neither decision, when examined carefully, lends support to the view that suppression is required if an officer arrests upon probable cause, but the arrest violates a state statute.

In *Di Re*, this Court reversed a federal conviction because it was based on evidence obtained in a warrantless arrest that was illegal under state law. Because "[n]o act of Congress lays down a general federal rule for arrest without warrant for federal offenses," this Court adopted as a governing rule "the law of the state where an arrest without warrant takes place determines it." *Id.* at 589. The Court drew from a federal statute, since amended, which provided that an arrest by judicial process for a federal offense must be made "agreeably to the usual mode of process against offenders in such State." *Id.* at 589-90. The Court reasoned that if federal statutory law

required compliance with state law for arrests *with a warrant*, federal courts should logically turn to state law to determine the validity of arrests *without a warrant*. *Id.* at 589-90. Since the arrest in *Di Re* was invalid under New York law, this Court held that the fruits of the search incident to arrest should be suppressed. *Id.* at 593-95.

First, as the text of *Di Re* shows, and as a number of courts have concluded, the decision was grounded not in the United States Constitution but on the supervisory power of this Court to exclude evidence under circumstances deemed improper but not unconstitutional. *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67. *See also* LaFave, *supra* at § 1.5 ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations'"). Second, as several appellate courts have recognized, the holding in *Di Re* is no longer valid in light of the Court's subsequent holdings in *Elkins*, 364 U.S. 206, and *Greenwood*, 486 U.S. 35. *See Wright*, 16 F.3d at 1434-36; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67.

DeFillippo is also inapposite. Although this Court ultimately held that even if an ordinance is later held unconstitutional, an officer can reasonably rely on it to make an arrest, 443 U.S. at 40, it nonetheless stated, "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* This statement is unremarkable, inasmuch as state law "is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* In other words, probable cause is the constitutional standard, but state law defines the crime for which the officer must have probable cause. *Accord Ryan v. County of DuPage*, 45 F.3d

1090, 1093 (7th Cir. 1995). Moreover, the statement in *DeFillippo* is dicta, because the defendant did "not contend that the arrest was not authorized by Michigan law." *DeFillippo*, 443 U.S. at 36.

Ultimately, *Di Re* and *DeFillippo* are entirely consistent with the rule – adopted by most of the lower courts – that an arrest that is founded on probable cause but is otherwise problematic under state law does not violate the United States Constitution. However, certain statements from those cases can act as a snare for lower courts. This Petition affords the Court the opportunity to clarify its jurisprudence on this important, recurring issue.

The standard for the constitutional validity of an arrest should be whether the officer has probable cause to believe that a crime has been committed. "State law neither adds nor subtracts from these constitutional rules." *Gordon*, 29 F.3d at 300.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

February 1, 2007

TABLE OF CONTENTS

Page

Opinion of the Virginia Supreme Court entered November 3, 2006 reversing the Court of Appeals....App. 1

Opinion of the Court of Appeals of Virginia Upon Rehearing En Banc entered November 22, 2005 upholding the trial court's denial of motion to suppress and affirming the conviction for possession of cocaine with intent to distribute.....App. 12

Opinion of the Court of Appeals of Virginia entered February 22, 2005 reversing and dismissing the indictment.....App. 35

Felony Order of the Circuit Court of the City of Portsmouth entered July 25, 2003 overruling Defendant's Motion to Strike.....App. 57

Sentencing Order of the Circuit Court of the City of Portsmouth entered October 10, 2003 .....App. 59

DAVID LEE MOORE

v.

COMMONWEALTH OF VIRGINIA

Record No. 052619.

Supreme Court of Virginia.

2006 Va. LEXIS 99

November 3, 2006, Decided

***JUDGES*:** Present: Hassell, C.J., Lacy, Keenan, Kinser, Lemons, and Agee, JJ., and Carrico, S.J. OPINION BY SENIOR JUSTICE HARRY L. CARRICO.

OPINION BY: HARRY L. CARRICO

OPINION: This appeal implicates Code § 19.2-74(A)(1). In pertinent part, this Code section provides that when a police officer detains a person for a Class 1 misdemeanor, the officer "shall . . . issue a summons . . . to appear at a time and place to be specified in such summons," and "[u]pon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." The Code section also contains several exceptions allowing a warrantless arrest pursuant to Code § 19.2-82 "if any such person shall fail or refuse to discontinue the unlawful act" or "if any person is believed by the arresting officer to be likely to disregard a summons . . . or . . . cause harm to himself or to any other person."

On February 20, 2003, two City of Portsmouth detectives, responding to a radio message that a motorist was operating a motor vehicle on a suspended license, stopped a vehicle being driven by the defendant, David Lee Moore. The officers ascertained that Moore was in fact operating on a suspended license. Although the offense is a Class 1

misdemeanor, Code § 46.2-301(C), the officers did not issue Moore a summons but arrested him, handcuffed him, and placed him in a police vehicle. They gave him the *Miranda*[1] warnings and secured his signature on a consent to search his room at the hotel where he was staying. They then took him to the hotel room.

Because of a "miscommunication" between the officers, they did not search Moore at the time he was arrested. Upon reaching his hotel room, they searched his person and found approximately 16 grams of crack cocaine in his jacket pocket and $516.00 in cash in his pants pocket. He admitted the cocaine was his.

Moore was indicted for possession of cocaine with intent to distribute. Code § 18.2-248. He then moved to suppress all the evidence obtained in the search of his person,[2] asserting that the seizure of the evidence violated the provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

The trial court denied the motion to suppress. In a bench trial, the court convicted Moore of possession with intent to distribute cocaine and sentenced him to serve five years in the penitentiary, with one year and six months suspended.

Moore appealed his conviction to the Court of Appeals of Virginia. A divided panel of the court reversed Moore's

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] In the hearing on the motion to suppress, one of the arresting officers was asked why Moore was arrested rather than given a summons. The officer replied, that it was "[j]ust our prerogative, we chose to effect an arrest."

conviction, finding the search of Moore "in violation of the Fourth Amendment." *Moore v. Commonwealth,* 45 Va.App. 146, 155, 609 S.E.2d 74, 79 (2005). However, upon rehearing en banc, a majority affirmed the conviction, finding that Moore's arrest did not violate his Fourth Amendment rights. *Moore v. Commonwealth,* 47 Va.App. 55, 64, 622 S.E.2d 253, 258 (2005). We awarded Moore this appeal.

On appeal, Moore argues that Code § 19.2-74 requires that the police issue a summons to a person detained for a Class 1 misdemeanor and to forthwith release him from custody upon his promise to appear at a specified time and place, unless he is subject to one or more of the exceptions listed in the statute. Moore asserts that none of the exceptions apply in this case.[3] Moore says that "[w]hen a person is unlawfully detained, as [he] was when he was arrested rather than being given a citation, the fruits of the unlawful detention must be suppressed." Moore concludes that the Court of Appeals en banc erred in holding that his "arrest and search did not violate the Fourth Amendment."

---

[3] The Court of Appeals found that "[b]ecause the record is devoid of any evidence to suggest Moore failed to discontinue the unlawful act, or that the facts could render a reasonable belief that Moore would fail to comply with the summons or cause harm to himself or others, . . . the arrest violated the express provisions of Code § 19.2-74." *Moore,* 47 Va.App. at 63, 622 S.E.2d at 257. The Commonwealth has not assigned cross-error to this finding. Accordingly, we will not consider the Commonwealth's argument that "[i]nasmuch as there was no one else to drive Moore's vehicle, the officers were within their statutory authority to arrest Moore; otherwise, he would have been unable to 'discontinue the unlawful act' of driving on a suspended license." *See Commonwealth v. Cary,* 271 Va. 87, 90 n.1, 623 S.E.2d 906, 907 n.1 (2006).

On the other hand, the Commonwealth argues that the search of Moore was valid. The Commonwealth maintains that "the police officers had probable cause to arrest Moore because he committed a misdemeanor in their presence," and the "search incident to an arrest . . . did not violate the Fourth Amendment."

In support of his position, Moore cites the decision of the Supreme Court of the United States in *Knowles v. Iowa,* 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), and this Court's decision in *Lovelace v. Commonwealth,* 258 Va. 588, 522 S.E.2d 856 (1999). In *Knowles,* an Iowa statute allowed a police officer to arrest a person for a traffic offense and immediately take him before a magistrate or to issue a citation in lieu of arrest. The statute further provided that the issuance of a citation in lieu of arrest "does not affect the officer's authority to conduct an otherwise lawful search." 525 U.S. at 115 (citing and quoting Iowa Code Ann. § 805.1(4)).

An Iowa policeman stopped Knowles for speeding and issued him a citation rather than arresting him. The officer then conducted a full search of the vehicle without either Knowles' consent or probable cause, found marijuana and a "pot pipe," and placed Knowles under arrest. Knowles moved to suppress the evidence. The trial court denied the motion and Knowles was found guilty. The Supreme Court of Iowa affirmed, upholding the constitutionality under a bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement. *Id.* at 115.

The Supreme Court of the United States reversed. Noting that the officer had issued Knowles a citation rather than arresting him, the Court stated that the "[t]he

question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car." The Court answered the question "no." *Id.* at 114.

The Court explained that in *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed. 2d 427 (1973), it had recognized a search incident to arrest exception to the Fourth Amendment, which allows a full field-type search of the person incident to a lawful custodial arrest. The Court noted that the exception was based upon "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles,* 525 U.S. at 116. However, the Court found that "neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case." *Id.* at 117.

The Court also said that while the concern for officer safety in a routine traffic stop "may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.*

The Court also said that Iowa had not shown a need to discover and preserve evidence. *Id.* at 118. Although asked to do so, the Court declined to extend the bright-line search incident to arrest exception to the Fourth Amendment recognized in *Robinson* to include a search incident to citation, a situation, the Court concluded, "where the concern for officer safety is not present to the same extent

and the concern for destruction or loss of evidence is not present at all." *Id.* at 119.

The Commonwealth argues that *Knowles* is not dispositive because the defendant there was not arrested and the decision in *Knowles* "holds that a search incident to a citation cannot be as expansive under the Fourth Amendment as one incident to an arrest." We cannot find such a holding in *Knowles.* In any event, it is clear that what the Court actually held in *Knowles* was that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation. *Id.* at 118-19.

The Commonwealth also argues that the Supreme Court's subsequent decision in *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), is controlling rather than *Knowles* and supports its position that the officers had probable cause to arrest Moore because he committed a misdemeanor in their presence. In *Atwater,* a police officer observed that Gail Atwater was driving her pickup truck with her young son and daughter in the front seat, all without seat belts. This conduct was prohibited by a Texas statute providing for a fine of not less than $25.00 nor more than $50.00. *Id.* at 323-24.

The officer pulled Atwater over, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was placed in a jail cell for about one hour, after which she was taken before a magistrate and released on bond. She ultimately pleaded no contest to the seat belt charges and paid a $50.00 fine. *Id.* at 324.

Atwater and her husband then filed an action in state court for damages against the officer, the City of Lago

Vista, and the City's chief of police, alleging that the defendants had violated Gail Atwater's Fourth Amendment rights. The action was removed to federal court. The Atwaters were unsuccessful in the lower courts, and the Supreme Court granted certiorari "to consider whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses." *Id.* at 326. The Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354.

Atwater, however, provides little support for the Commonwealth's position in this case. The Texas statute "expressly authorizes 'any peace officer [to] arrest without warrant a person found committing a violation' of [the Texas] seatbelt laws, [Tex. Transp. Code Ann.] § 543.001, although it permits police to issue citations in lieu of arrest." *Id.* at 323. The authority to effect such an arrest is lacking from our § 19.2-74, the statute at issue in this case. Furthermore, *Atwater* only involved the legality of an arrest; it did not involve any question about a search incident to the arrest.

Lovelace v. Commonwealth, 258 Va. 588, 522 S.E.2d 856 (1999), the other case cited by Moore in support of his position, came to this Court upon remand from the Supreme Court of the United States. John David Lovelace had been convicted in the Circuit Court of Halifax County for possession of marijuana and possession with intent to distribute cocaine. He appealed, alleging that the trial court had erred in denying his motion to suppress evidence that was seized from him during a search of his person.

The Court of Appeals of Virginia affirmed the convictions. *Lovelace v. Commonwealth,* 27 Va.App. 575, 500 S.E.2d 267 (1998). This Court refused Lovelace's petition for appeal and his subsequent petition for rehearing. Thereafter, the Supreme Court of the United States granted Lovelace a writ of certiorari, vacated the judgment of this Court, and remanded the case to this Court for further consideration in light of its decision in *Knowles. Lovelace v. Virginia,* 526 U.S. 1108, 119 S.Ct. 1751, 143 L. Ed. 2d 784 (1999).

The *Lovelace* case implicated Code § 19.2-74(A)(2), which provides that "[w]henever any person is detained by . . . an arresting officer for a violation . . . of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, . . . the arresting officer shall take the name and address of such person and issue a summons . . . [and] shall forthwith release him from custody."

About ten o'clock at night, two deputy sheriffs observed Lovelace and several other men standing with open bottles of beer in their hands on the parking lot of a store in an area described as an "'open air drug market.'" Lovelace had a green bottle up to his mouth and appeared to be drinking from it. The men were ordered to lie face down on the ground after the deputies saw a bottle fly through the air and strike a car but could not see who threw it, although it came from the area where Lovelace had been standing. 258 Va. at 591, 522 S.E.2d at 857.

One of the deputies, Mike Womack, then approached Lovelace, who was lying on the ground as directed, and asked Lovelace his name. Lovelace identified himself but remained silent when asked whether he had any guns or

drugs. Womack then performed a "patdown" of Lovelace and felt something like a bag in his pocket. The deputy did not know if it was a plastic bag or what but he felt some lumps and something "squooshy," and he reached into Lovelace's pocket and retrieved the bag. The officer then arrested Lovelace and charged him with possession of marijuana and possession with intent to distribute cocaine, but not with any alcohol-related offense. The substance in the bag was later tested and identified as crack cocaine. The test also identified some marijuana. *Id.* at 591-92, 522 S.E.2d at 857.

The Commonwealth argued in *Lovelace* that the officers had probable cause to arrest Lovelace for drinking an alcoholic beverage in public and thus could conduct a search incident to arrest. We disagreed, based on *Knowles,* and stated as follows:

> The encounter between Lovelace and the officers, while not involving a traffic offense, was nonetheless similar in nature and duration to a routine traffic stop. We reach this conclusion primarily because the initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed Womack

> to search him. After *Knowles,* an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.

Id. at 596, 522 S.E.2d at 860 (emphasis added). We concluded that "the search of Lovelace was not consistent with the Fourth Amendment," and we reversed and dismissed both of Lovelace's convictions. *Id.* at 597, 522 S.E.2d at 860.

The Commonwealth distinguishes *Lovelace* by saying that the police officer detained Lovelace to issue a citation and did not arrest him, give him the *Miranda* warnings, or inform him he was under arrest while, in Moore's case, he was placed under arrest and thus the officers "did not exceed their authority when they conducted the search" of Moore.

This is a distinction that makes no difference. While Lovelace was not actually arrested until after Officer Womack retrieved the "squooshy" bag from his pocket, Womack insisted in his testimony that, initially, he was "detaining the defendant because of the open containers of beer, the bottle-throwing incident, and the odor of alcohol that he noticed when speaking with Lovelace," *id.* at 592, 522 S.E.2d at 857, facts indicative of the Class 4 misdemeanor of drinking in public. Code § 4.1-308. It was the type of offense for which Womack was detaining Lovelace that triggered the operation of Code § 19.2-74 and permitted Womack to issue only a summons to Lovelace since none of the statute's exceptions were present. Because Womack was authorized to issue only a summons for the alcohol-related offense, he could not lawfully conduct a full field-type search incident to an arrest. *Lovelace,* 258 Va. at 596, 522 S.E.2d at 860.

The same conclusion applies to the case at bar. Our statement in *Lovelace* could have equally been written using Moore and his charged offense: "The fact that the officers could have issued only a summons for the [driving on suspended license] offense also negates the Commonwealth's argument that the existence of probable cause to charge [Moore] with [driving on suspended license] allowed [the officer] to search him." *Id.*

The officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles,* the officers could not lawfully conduct a full field-type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment. Accordingly, we will reverse the judgment of the Court of Appeals and dismiss the indictment against Moore.

Reversed and dismissed.

DAVID LEE MOORE v.
COMMONWEALTH OF VIRGINIA

Record No. 2648-03-1

COURT OF APPEALS OF VIRGINIA

47 Va. App. 55; 622 S.E.2d 253;
2005 Va. App. LEXIS 536

November 22, 2005, Decided

COUNSEL: S. Jane Chittom, Appellate Defender (Virginia Indigent Defense Commission, on brief), for appellant.

Susan L. Parrish, Assistant Attorney General (Judith Williams Jagdmann, Attorney General, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judges Benton, Elder, Bumgardner, Frank, Humphreys, Clements, Felton, Kelsey, McClanahan and Haley. OPINION BY JUDGE ROBERT J. HUMPHREYS. Elder, J., joined by Fitzpatrick, C.J., Benton and Frank, JJ., concurring, in part, and dissenting, in part.

OPINION BY: ROBERT J. HUMPHREYS

OPINION: OPINION BY JUDGE ROBERT J. HUMPHREYS

UPON REHEARING EN BANC

This matter comes before the Court on rehearing *en banc* from a divided panel opinion issued February 22, 2005. David Lee Moore ("Moore") argues on appeal that his conviction for possession of cocaine with intent to distribute should be reversed because the trial court erred in denying his motion to suppress. Moore reasons that,

because his underlying arrest for driving on a suspended license violated both Code § 19.2-74(A)(1) and the Fourth Amendment to the United States Constitution, the evidence uncovered during the search incident to that arrest must be suppressed. For the reasons that follow, we affirm his conviction.

I. Background

On appeal, we review the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the Commonwealth, the prevailing party below. *Garcia v. Commonwealth*, 40 Va. App. 184, 189, 578 S.E.2d 97, 99 (2003). So viewed, the evidence establishes the following.

On February 20, 2003, Detective B.J. Karpowski overheard a conversation on his police radio between Officers McAndrew and Anthony. The officers were discussing the fact that a man nicknamed "Chubs" was driving a car in the area. Drawing on his knowledge that a man nicknamed "Chubs" had just been released from a federal penitentiary and was driving on a suspended license, Karpowski radioed the other officers and told them to stop the vehicle driven by "Chubs."[1]

Officers Anthony and McAndrew responded to Karpowski's radio message and stopped Moore, whom Officer Anthony knew was nicknamed "Chubs." Although Moore was not the man Detective Karpowski referred to in his

---

[1] Detective Karpowski had checked the driver's license of a man named "Chubs" the week before, and had determined he was driving on a suspended license. However, the man Karpowski knew to be nicknamed "Chubs" was a man named Christopher Delbridge, not David Moore.

radio message, Officer Anthony determined that Moore was, in fact, driving on a suspended license.

After confirming that Moore's license was suspended, Officer Anthony arrested Moore, handcuffed him, and advised him of his *Miranda* rights. Officer Anthony then asked Moore if he understood his rights, and Moore acknowledged that he did. Officer Anthony also asked Moore where he was staying and if he had any narcotics on his person. Moore voluntarily told Officer Anthony that he was staying in an Econo-Lodge in Chesapeake. Moore was then taken to Officer McAndrew's vehicle, where Moore signed a waiver of consent allowing the officers to search his hotel room.[2] Moore was then placed in Officer McAndrew's police car. However, due to a miscommunication, neither officer conducted a search incident to arrest at that time. In fact, Officer McAndrew was "under the impression that [Moore] had been searched prior to placing him in my police vehicle."

Once Moore was placed in the police car, the officers called animal control to pick up a dog that was riding in Moore's vehicle.[3] After animal control arrived forty-five minutes later, the officers drove to the hotel room where

---

[2] Officer Anthony testified this all happened "approximately fifteen minutes after we had him stopped."

[3] The officers believed the dog was a pit bull, and it was "very upset with [the detectives' presence]" and "big enough" that the officers "did not want to get too close to it." The Commonwealth argues on brief that the dog's presence was a factor in the officers' determination that Moore would be unable to discontinue the unlawful act of driving on a suspended license. The Commonwealth's contention is without merit because Moore's arrest was in violation of Code § 19.2-74(A)(1), and it did not fall into any of the exceptions allowing the officers to effectuate such an arrest. *See* Part II(A), *infra*.

Moore had been staying. There, Officer McAndrew realized Moore had not been searched. The officers made a protective sweep of the hotel room, and Officer McAndrew then conducted a search of Moore incident to arrest. He recovered crack cocaine from Moore's jacket and $ 516 in cash from his pants pocket. Moore was then taken back to the City of Portsmouth.

Moore moved to suppress the evidence recovered from his person on statutory and constitutional grounds, arguing the search of his person was tainted by the illegal arrest that preceded it. Specifically, Moore argued the arrest was illegal because the detectives failed to release him on a summons pursuant to Code § 19.2-74(A)(1).

When asked at the suppression hearing why Moore was arrested, Officer Anthony stated, "just our prerogative, we chose to effect an arrest." Additionally, after the traffic stop, "narcotics were eventually recovered." When asked why Moore was not released on a summons, Anthony replied, "Well, we were still in the middle of an investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation."

The trial court denied the motion to suppress, holding that the arrest neither violated the Fourth Amendment nor Virginia law permitting an officer to arrest for a misdemeanor committed in his presence. After hearing additional evidence, the trial court convicted Moore of possession of cocaine with intent to distribute, and sentenced him to five years in prison, with one year and six months suspended.

On appeal, a divided panel of this Court reversed the judgment of the trial court. *See* ***Moore v. Commonwealth*, 45 Va. App. 146, 609 S.E.2d 74 (2005)**. We granted the Commonwealth's petition for *en banc* review, stayed the mandate of the panel decision, and reinstated the appeal. Upon rehearing *en banc*, we affirm the judgment of the trial court and reinstate Moore's conviction.

II. Analysis

On appeal, "this Court is 'bound by the trial court's findings of historical fact unless "plainly wrong" or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.'" *Davis v. Commonwealth*, 37 Va. App. 421, 429, 559 S.E.2d 374, 378 (2002) (quoting *Neal v. Commonwealth*, 27 Va. App. 233, 237, 498 S.E.2d 422, 424 (1998)). However, "whether a defendant is seized in violation of the Fourth Amendment is a question that is reviewed *de novo* on appeal." *Id.*

Moore argues on appeal that, because the initial arrest was unauthorized by Code § 19.2-74, it was also in violation of his Fourth Amendment rights. As such, Moore contends the fruits of the subsequent search, specifically, the cocaine recovered from his person, must be suppressed. In response, the Commonwealth argues that Moore's arrest did not violate Code § 19.2-74.[4] The Commonwealth reasons that, because Moore was the only one driving the car, and because he did not have a valid

[4] Neither Moore nor the Commonwealth disputes that there was a custodial arrest. The only contention is the validity of that arrest under both the Code of Virginia and the United States Constitution.

driver's license, Moore ultimately would "fail to discontinue the unlawful act."[5] The Commonwealth further contends that, even if the arrest was invalid, it nonetheless was constitutional and does not trigger the application of the Fourth Amendment exclusionary rule.

For the reasons that follow, we hold that, although the arrest violated the express provisions of Code § 19.2-74, the arrest and resulting search did not violate Moore's constitutional – as opposed to statutory – rights. And, because Code § 19.2-74 does not provide an exclusionary remedy, we must affirm the trial court's denial of Moore's motion to suppress.

A. The Application of Code § 19.2-74

Code § 19.2-74 provides, in pertinent part, that

> Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence . . . the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified

[5] In its brief, the Commonwealth did not address whether the officers had probable cause to arrest Moore, and Moore concedes the existence of probable cause that an offense under the laws of the Commonwealth was committed. The Commonwealth only argues that the officers did not violate the statute by arresting him. The Commonwealth contends the arrest was in accordance with one of the three exceptions as listed in the statute to the citation requirement.

> in such summons or notice. *Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody.*

Code § 19.2-74(A)(1) (emphasis added). The statute also sets forth several exceptions to this general rule, providing that an officer may effectuate a warrantless arrest, pursuant to Code § 19.2-82, if: (1) "any such person shall fail or refuse to discontinue the unlawful act," or (2) "if any person is believed by the arresting officer to be likely to disregard a summons . . . or . . . to be likely to cause harm to himself or to any other person. . . ." Code § 19.2-74(A)(1).

Accordingly, Code § 19.2-74, in conjunction with Code § 19.2-82, permits an officer to conduct a warrantless custodial arrest in two types of circumstances. First, an arrest is proper if the person fails or refuses to discontinue the unlawful act or refuses to give a written promise to appear. *Id.* Second, an arrest is also proper if the officer reasonably believes the person will likely disregard the summons or will likely do harm to himself or to others. *Id.*

In the first instance, the ability to arrest is based upon the offender's actual conduct, not potential future conduct. Thus, according to *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856 (1999), only if Moore had "failed or refused to discontinue the unlawful act could the officers have effected a custodial arrest and taken the defendant before a magistrate." *Id.* at 596, 522 S.E.2d at 860. In this case, Moore complied with all of the officers' requests, including discontinuing the unlawful conduct when he stopped his vehicle. There is no evidence showing Moore failed or refused to discontinue the unlawful act.

Moreover, Moore did not refuse to give a written promise to appear, as a summons was never issued.

In the second instance, an arrest may be based on a "reasonable belief" about the offender's future conduct. However, "although the statute refers to predictive estimation of the accused person's future conduct, the standard for determining satisfaction of the statute is objective, whether evidence supports a reasonable belief that the statutory circumstances obtain." *Fox v. Commonwealth*, 43 Va. App. 446, 450, 598 S.E.2d 770, 771 (2004). In this case, there is no evidence that Moore would disregard the summons or would be likely to cause harm to himself or to others. Moore did not argue with the officers, nor did they have any reason from past experience to believe that he would not comply with the summons. *Cf. Smith v. Commonwealth*, 30 Va. App. 737, 742-43, 519 S.E.2d 831, 833 (1999) (holding officers could arrest the defendant for breach of the peace when she used profane language and kicked the officers while they attempted to obtain information about her identity).

Because the record is devoid of evidence to suggest Moore failed to discontinue the unlawful act, or that the facts could render a reasonable belief that Moore would fail to comply with the summons or cause harm to himself or others, we hold that the arrest violated the express provisions of Code § 19.2-74.

B. The Application of the Fourth Amendment to the Search

Moore also argues that, because the arrest violated Code § 19.2-74, the arrest and subsequent search also violated his Fourth Amendment rights. For the reasons

that follow, we find that neither the arrest nor the search violated Moore's constitutional rights.

1. The Constitutional Validity of the Arrest.

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001), the United States Supreme Court held that, when "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354. "The standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.'" *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

Here, the officers had probable cause to arrest Moore for committing a misdemeanor in their presence. Specifically, Officers Anthony and McAndrew detained Moore because they had reason to believe, based on radio information received from a fellow officer, that Moore was driving on a suspended license. Although the record indicates that the officers were mistaken about the identity of the "Chubs" referred to by Detective Karpowski, the Supreme Court has held that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971). Because the officers observed Moore, a. k. a. "Chubs," driving his vehicle on what they had reason to believe was a suspended license, the officers had probable cause to believe that Moore was committing a crime in

their presence. And, because the officers had probable cause that Moore committed a criminal offense, his arrest did not violate the Fourth Amendment. *See Atwater*, 532 U.S. at 354.

Moore argues, however, that *Atwater* does not apply in this case, claiming *Atwater* dealt with a Texas statute specifically authorizing an arrest for violation of that statute. Moore cites *West v. Commonwealth*, 36 Va. App. 237, 549 S.E.2d 605 (2001), to support this contention.[6] However, *West* is distinguishable because the search at issue in that case took place when the defendant was in the process of being released on a summons and thus was no longer under arrest such as would justify a search incident to arrest. Crucial to our analysis is the fact that the Supreme Court's holding in *Atwater* – that an arrest based on probable cause does not violate the Constitution – *was not* contingent upon the construction of the particular Texas statute. In fact, "had the court intended to condition the constitutionality of an arrest on state law, it had ample opportunity to say so. . . ." *People v. McKay*, 27

[6] In *West*, the trial court denied a motion to suppress the evidence obtained as a result of a search. *West*, 36 Va. App. at 238, 549 S.E.2d at 605. This Court reversed, finding the search was in violation of the defendant's Fourth Amendment rights. *Id.* The officer, operating under "the preference for the issuance of a summons," began to write a summons for failing to signal a turn. *Id.* at 241, 549 S.E.2d at 607. The officer then noticed a bulge in defendant's shoe, searched him, retrieved cocaine, and arrested him. *Id.* At the time of the search, defendant had been placed under "arrest" for the sole purpose of writing a citation. Before spotting the bulge in the defendant's shoe, the officer had decided to issue the summons rather than arrest defendant because he had no "indication [defendant] would not appear or that he was a threat to himself or others." *Id.* This Court found the officer conducted a search incident to a citation, which violates the Fourth Amendment. *See Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998).

Cal. 4th 601, 117 Cal. Rptr. 2d 236, 41 P.3d 59, 68 (Cal. 2002).[7] Moreover, the "'Supreme Court has *never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of [a suspect into] custody was deemed unnecessary (as a matter of state law or otherwise).'" *Id.* at 66 n.4 (quoting 1 LaFave, Search and Seizure § 1.5(b), p. 141 (3d ed. 1996)) (emphasis in original).

Moore also contends the officers did not have probable cause to arrest him "because there can be no probable cause to arrest where arrest is contrary to the controlling statute." For the reasons identified above, the issue of probable cause is determined separate and apart from whether an arrest violates a state statute. Accordingly, because the officers had probable cause to arrest Moore for committing a misdemeanor in their presence, the arrest – although unauthorized by Code § 19.2-74 – did not violate the Fourth Amendment.

2. The Constitutional Validity of the Search.

In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the United States Supreme Court held that a search incident to an arrest that is based upon probable cause complies with the Fourth Amendment

---

[7] The *Atwater* Court rejected the argument that there should be a new rule of constitutional law forbidding custodial arrest, even on probable cause, for minor offenses which ultimately carry no jail time and for which the government can show no compelling need for immediate detention. *Atwater*, 532 U.S. at 345-50. In order to address the concerns that may arise when officers arrest for minor crimes or misdemeanors, the *Atwater* Court recognizes that many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for such offenses. *Id.* at 352.

and, thus, "requires no additional justification." *Id.* at 235. As noted by the *Robinson* Court,

> the authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id.; *see also New York v. Belton*, 453 U.S. 454, 461, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Because, as discussed above, Moore's arrest was based upon probable cause, the search incident to that arrest did not violate the Fourth Amendment. Moore argues, however, that, because the initial arrest was "unlawful," *Robinson* does not apply. Moore reasons that the Virginia Supreme Court's decision in *Lovelace* mandates a finding that the search subsequent to the arrest violated his Fourth Amendment rights. We disagree.

In *Lovelace*, a police officer detained the defendant for a misdemeanor and searched him. The officer "did not actually arrest [the defendant] until after he retrieved the [drugs] from the defendant's pocket." *Lovelace*, 258 Va. at 592, 522 S.E.2d at 857. Applying Code § 19.2-74 and the

Knowles holding – specifically, that a search conducted incident to a citation violates the Fourth Amendment – the Supreme Court of Virginia held an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.[8]

Moore's reliance upon *Lovelace*, however, is without merit. Although *Lovelace* may, at first glance, seem to be dispositive of the issue before this Court, further analysis indicates otherwise. In determining that the search was a violation of the defendant's Fourth Amendment rights, the Supreme Court of Virginia held that the citation requirement negated the Commonwealth's argument that probable cause to arrest justified the search. *Id.* at 595, 522 S.E.2d at 860. The *Lovelace* Court stated that the bright-line rule regarding a search incident to arrest, as set forth in *Robinson*, did not apply because the detention contemplated in *Lovelace* was similar in nature and duration to a traffic stop. In other words, in *Lovelace*, the officers did not intend to arrest the defendant at the onset of the encounter. Rather, the detention was similar to a stop and frisk,

---

[8] The Supreme Court of Virginia also recognized that Code § 19.2-74(A)(2) did not contemplate a custodial situation equivalent to an actual custodial arrest. *Lovelace*, 258 Va. at 596, 522 S.E.2d at 858; *see also Rhodes v. Commonwealth*, 29 Va. App. 641, 513 S.E.2d 904 (1999) (applying *Knowles*). However, in this case, the officers *did* effectuate a custodial arrest in violation of the statute. This presents two problems. First, the Supreme Court of the United States has never addressed this particular situation and determined that an arrest in violation of a state law is also a violation of the federal Constitution. Second, the legislature did not contemplate this situation, where Moore suggests that "an officer . . . turns a citation offense into an arrest offense, and thereby insulates the search from judicial review." However, if the legislature did consider this particular circumstance, they decided not to provide the remedy of excluding evidence obtained after that arrest.

and the defendant was arrested only after an illegal pat down revealed a bag of crack cocaine. The officer admitted that he retrieved the bag from the defendant's pocket even though "the object . . . did not feel like a gun, he did not know what was in the bag, and [] he did not have a search warrant." *Id.* at 591, 522 S.E.2d at 857.

In contrast, the facts of this case indicate the officers intended to effect a custodial arrest from the time they detained Moore. They placed him under arrest, read him his *Miranda* rights, and obtained a written consent to search his hotel, all within fifteen minutes of the initial stop. Thus, *Lovelace* is not controlling, and the bright-line rule announced in *Robinson* applies. That is, because the arrest was based on probable cause, and because the search was conducted incidental to that arrest, the search did not violate the Fourth Amendment.[9]

C. The Application of the Exclusionary Rule.

Lastly, Moore argues that exclusion of the evidence should be the remedy for the cocaine seized during the

---

[9] The dissent would hold that *Knowles* controls the outcome of this appeal, correctly noting that *Knowles* prohibits a search incident to a citation. However, the reasoning of the dissent fails to consider the underlying rationale for the United States Supreme Court's decision in *Knowles*. When read against its decision in *Robinson*, as noted above, *Knowles* simply stands for the proposition that the constitutional rationale justifying a search incident to arrest evaporates when a suspect is either no longer under arrest, as was the case in *Knowles*, or never under arrest, as was the case in *Lovelace*. Neither is the case here. However statutorily infirm Moore's custody status was, probable cause unquestionably existed that Moore had committed a criminal offense under the laws of the Commonwealth. We thus reiterate that, on these facts, *Robinson* and *Atwater* control the outcome of this appeal.

search subsequent to the unlawful arrest. The Commonwealth argues that the exclusion of evidence is not a proper remedy unless the statute so provides. For the reasons that follow, we hold that, even though the arrest violated Code § 19.2-74, the exclusionary rule does not apply.

As we stated in *Troncoso v. Commonwealth*, 12 Va. App. 942, 407 S.E.2d 349, 8 Va. Law Rep. 294 (1991), "historically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression unless the statute supplies that right." *Id.* at 944, 407 S.E.2d at 350 (citing *Commonwealth v. Brown*, 8 Va. App. 41, 44, 378 S.E.2d 623, 624, 5 Va. Law Rep. 2091 (1989) (Baker, J., concurring)); *see also Horne v. Commonwealth*, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986); *Hart v. Commonwealth*, 221 Va. 283, 287 n.*, 269 S.E.2d 806, 809 n.* (1980). The Supreme Court of Virginia "has steadfastly refused to extend [the rule set forth in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914),] to encompass evidence seized pursuant to statutory violations, absent an express statutory provision for suppression.[10] *Troncoso*, 12 Va. App. at 944, 407 S.E.2d at 350; see also *Hall v. Commonwealth*, 138 Va. 727, 733-34, 121 S.E. 154, 156 (1924); *Thompson v. Commonwealth*, 10 Va. App. 117, 122, 390 S.E.2d 198, 201, 6 Va. Law Rep. 1178 (1990).

[10] In *Weeks*, the Supreme Court held that evidence obtained in violation of constitutional proscriptions against unreasonable searches and seizures may not be used against the accused. This rule was also made applicable to the states through *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961).

In the present case, the arrest did not violate Moore's Fourth Amendment rights, which would have triggered the exclusionary rule. Rather, the arrest violated a state statute that does not provide for the exclusion of evidence retrieved from a search subsequent to that arrest. Because the statute does not provide the exclusionary remedy, we may not supply one judicially. Accordingly, we hold that no exclusionary rule applies, and, thus, the trial court did not err in denying Moore's motion to suppress.

III. Conclusion

For the foregoing reasons, we uphold the trial court's denial of the motion to suppress and affirm Moore's conviction for possession of cocaine with intent to distribute.

Affirmed.

CONCUR BY: Elder (In Part)

DISSENT BY: Elder (In Part)

DISSENT:

Elder, J., joined by Fitzpatrick, C.J., Benton and Frank, JJ., concurring, in part, and dissenting, in part.

I join in the majority's recitation of the facts and its conclusion in Part II.A. that David Lee Moore's arrest violated the express provisions of Code § 19.2-74. However, I disagree with the majority's conclusion that this statutory violation did not rise to a constitutional violation under the facts of this case. I would hold that the decision in *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), compels the conclusion that the search incident to the unlawful custodial arrest was

unreasonable under the Fourth Amendment. Thus, I would reverse and dismiss the indictment, and I respectfully dissent from the judgment.

As the United States Supreme Court explained in *Knowles*, the Fourth Amendment places limitations on searches conducted incident to issuance of a citation. In *Knowles*, an Iowa police officer stopped Knowles for speeding and, as permitted by statute, exercised his discretion to issue Knowles a citation rather than arrest him. *Id.* at 114, 119 S. Ct. at 486. After issuing the citation, the officer conducted a full search of Knowles's car, found a bag of marijuana and a "pot pipe" under the driver's seat, and arrested Knowles for offenses related to his possession of that contraband. *Id.* The Supreme Court considered whether conducting a full search of Knowles's vehicle pursuant to the issuance of a traffic citation was consistent with the Fourth Amendment and concluded that it was not. *Id.*

According to the Supreme Court, "two historical rationales [exist] for the 'search incident to arrest' exception [to the Fourth Amendment]: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id.* at 116, 119 S. Ct. at 487. It "recognized that 'the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.'" *Id.* at 117, 119 S. Ct. at 488 (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5, 94 S. Ct. 467, 476 n.5, 38 L. Ed. 2d 427 (1973)). The Court determined in *Knowles* that neither rationale was present and refused to extend the "search-incident-to-arrest" exception to permit searches incident to the issuance of citations. *Id.* at 118-19, 119 S. Ct. at 488. The Court held

that "officers have other, independent bases to search for weapons and protect themselves from danger," including the ability to "perform a 'patdown' of [the detainee] upon reasonable suspicion that [he] may be armed and dangerous." *Id.* at 117-18, 119 S. Ct. at 488 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

The Virginia Supreme Court addressed a similar issue in *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856 (1999). Lovelace and several other men were drinking beer while standing in the parking lot of a convenience store known to be an "open air drug market." *Id.* at 591, 522 S.E.2d at 857. Officers in the area saw a beer bottle fly through the air but did not see who threw it. *Id.* One officer testified that the bottle came from the area where Lovelace was standing. *Id.* Lovelace and the other men were ordered to lie face down on the ground. *Id.* An officer approached Lovelace and asked him his name. *Id.* Lovelace identified himself but remained silent when the officer asked him whether he had any drugs or guns. *Id.* The officer proceeded to "pat down" Lovelace. *Id.* In Lovelace's pocket, he felt something like a plastic bag with lumps in it, but he did not know what was in the bag. *Id.* at 591-92, 522 S.E.2d at 857. The officer nevertheless reached in Lovelace's pocket and retrieved the bag. *Id.* at 592, 522 S.E.2d at 857. The substance was later identified as crack cocaine. *Id.*

In reversing Lovelace's conviction, the Court said:

> *Knowles* is applicable. . . . The initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer

> have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him. After *Knowles*, an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.
>
> Nor do we believe that Code § 19.2-74(A)(2) contemplates a custodial situation equivalent to an actual custodial arrest. Under that statute, a suspect is detained, or in the custody of the police officer, only long enough for the officer to take down the name and address of the person and issue a summons. One of the reasons that the *Knowles* Court did not extend the *Robinson* "bright-line rule" to a "search incident to citation" was because the duration of the encounter between a police officer and a defendant is "relatively brief" when the officer issues a citation. Thus, the threat to officer safety is less.

Id. at 596, 522 S.E.2d at 860; *see also West v. Commonwealth*, 36 Va. App. 237, 549 S.E.2d 605 (2001); *Rhodes v. Commonwealth*, 29 Va. App. 641, 513 S.E.2d 904 (1999) (en banc).

The United States Supreme Court subsequently revisited *Knowles*, holding in *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557, 149 L. Ed. 2d 549 (2001), that an officer effecting a custodial arrest for a

misdemeanor traffic offense may search the arrestee without violating the Fourth Amendment. However, we noted in *West* that the Court in *Atwater* reached this conclusion in the context of a state statute that expressly authorized a custodial arrest in such circumstances and gave the officer the discretion to issue a summons in lieu of effecting an arrest. *West*, 36 Va. App. at 242 n.2, 549 S.E.2d at 607 n.2. Because the statute at issue in *Atwater* was significantly different from Virginia's, we held in *West* that the ruling in *Atwater* "does not apply in this case." *Id.* We then applied *Knowles* to hold unconstitutional the search of West conducted while he was handcuffed and under arrest for a citation-only offense. *Id.* at 240-42, 549 S.E.2d at 606-07. Thus, we concluded in *West* that the holding in *Atwater* had no effect on the holding of *Knowles* that an officer who conducts a search pursuant to issuance of a summons violates the Fourth Amendment. *See id.*

The majority's holding here, in essence, overrules the interpretation of *Atwater* we made in *West*. Of course, the Court sitting *en banc* has the authority to overrule a panel decision, but I believe its legal basis for doing so is constitutionally unsound because *Atwater* did not address the impact of the Fourth Amendment on a search incident to a custodial arrest for a misdemeanor offense effected in violation of a state statute authorizing only the issuance of a summons.

Here, rather than searching pursuant to issuance of a summons – a clear violation of the Fourth Amendment – as in *Knowles* and *West*, the detectives effected a full custodial arrest of Moore and searched him pursuant to that arrest. We all agree that arrest violated Code § 19.2-74 but disagree as to the ramifications of that violation. I agree with the majority that, ordinarily, a statutory

violation does not require the suppression of evidence obtained as a result of that violation "'absent an express statutory provision for suppression.'" *Janis v. Commonwealth*, 22 Va. App. 646, 651, 472 S.E.2d 649, 652 (quoting *Troncoso v. Commonwealth*, 12 Va. App. 942, 944, 407 S.E.2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc*, 23 Va. App. 696, 24 Va. App. 207, 479 S.E.2d 534 (1996). However, in light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, I would conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment. *Knowles* holds that if an officer, exercising his discretion as permitted by statute, chooses only to issue a citation rather than to effect a full arrest, a search incident to issuance of that citation is unconstitutional. I see no reason to reach a different result when it is the legislature that has concluded that, absent additional facts, only a citation should be issued for a particular offense.[11]

Although *Knowles* did not expressly address this scenario, neither *Knowles* nor *Atwater* precludes this approach, and I would hold that exclusion, under the facts of Moore's case, is a logical and necessary extension of the decision in *Knowles*. The Virginia Supreme Court intimated as much in *Lovelace* when it observed "The fact that the officers could have issued only a summons for the alcohol-related offense [under the relevant state statute]

[11] The Court recognized in *Atwater* that "it is . . . easier to devise a minor-offense limitation by statute than to derive one through the Constitution. . . ." 532 U.S. at 352, 121 S. Ct. at 1556.

also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him." 258 Va. at 596, 522 S.E.2d at 860. Where a statute authorizes only the issuance of a citation for certain minor offenses, pursuant to which a full search would be unconstitutional under *Knowles*, to hold admissible the fruits of a search, conducted by an officer who effects a full custodial arrest under circumstances clearly not permitted by statute, would yield undesirable results and would be fraught with the potential for abuse. Any officer so desiring could intentionally effect a full custodial arrest contrary to clearly established state law in order to avoid running afoul of *Knowles*, thereby placing the search beyond the reach of the Fourth Amendment's exclusionary rule. *Cf. Crosby v. Commonwealth*, 6 Va. App. 193, 200-01 367 S.E.2d 730, 4 Va. Law Rep. 2341 & n.9, 6 Va. App. 193, 367 S.E.2d 730, 735, 4 Va. Law Rep. 2341 & n.9 (1988) (holding existence of probable cause and exigent circumstances may justify warrantless entry of residence so long as police are "not . . . responsible for creating their own exigencies").

Under appropriate circumstances, the good faith exception to the exclusionary rule permits the admission of evidence obtained by an officer mistaken about the law. *See, e.g., United States v. Gould*, 326 F.3d 651, 659-60 (5th Cir. 2003). However, the burden rests on the government to prove good faith. *See, e.g., United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001). Here, the Commonwealth made no argument that the arresting officers misperceived the law. Further,

> the exception is not devised for the unlawful conduct of *all* officers who mean well. The good faith

> belief must be grounded in *objective* reasonableness. The mistake of an operative fact or an error of technical nature may not bar admission of evidence.
>
> [Circumstances are different where the mistake is] on a basic point of established law. To extend the exception so far as to allow evidence of a clearly unlawful warrantless search ... would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule.

United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1986) (citations omitted) (emphases added). When Detectives Anthony and McAndrew encountered Moore on February 20, 2003, both the relevant provisions of Code § 19.2-74 and the Supreme Court's 1998 holding in *Knowles* were established law, and the detectives' misapplication of that law was not objectively reasonable.

Applying these principles to the facts of this case, I would hold the search was unconstitutional because the Code made clear that, absent additional facts, the detectives were required to issue Moore a summons for the misdemeanor offense of driving on a suspended license. *See* Code § 19.2-74; Code § 46.2-301 (providing that driving while one's license is suspended is a Class 1 misdemeanor). Moore's arrest violated Code § 19.2-74, and the evidence obtained as a result of the search, which was, in effect, conducted pursuant to issuance of a citation, should have been suppressed pursuant to *Knowles* as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963). For these reasons, I would reverse and dismiss the indictment, and I respectfully dissent.

DAVID LEE MOORE v. COMMONWEALTH OF VIRGINIA

Record No. 2648-03-1

COURT OF APPEALS OF VIRGINIA

45 Va. App. 146; 609 S.E.2d 74; 2005 Va. App. LEXIS 80

February 22, 2005, Decided

COUNSEL: S. Jane Chittom, Appellate Defender (Virginia Indigent Defense Commission, on briefs), for appellant.

Susan L. Parrish, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judge Elder and Senior Judge Annunziata.* OPINION BY JUDGE LARRY G. ELDER, Annunziata, J., dissenting.

OPINION BY: LARRY G. ELDER

OPINION: David Lee Moore (appellant) appeals his conviction under Code § 18.2-248 for possession of cocaine with intent to distribute. Appellant argues on appeal that his conviction should be reversed because the trial court erred in denying his motion to suppress. Appellant's motion to suppress was based on the failure of police to issue a summons instead of effecting an arrest, pursuant to Code § 19.2-74(A)(1), when they stopped his car and determined he was driving on a suspended license. For the following reasons, we reverse.

---

* Judge Annunziata participated in the hearing and decision of this case prior to the effective date of her retirement on December 31, 2004 and thereafter by her designation as a senior judge pursuant to Code § 17.1-401.

I.

BACKGROUND

On appeal, we review the evidence, and all reasonable inferences that can be drawn from the evidence, in a light most favorable to the Commonwealth as the party prevailing below. *Garcia v. Commonwealth,* 40 Va. App. 184, 189, 578 S.E. 2d 97, 99 (2003). So viewed, the evidence establishes that on February 20, 2003, Detective B.J. Karpowski overheard a conversation on his police radio about a man, whose nickname was "Chubs," driving a car in the area. Drawing on his knowledge that a man nicknamed Chubs had just been released from a federal penitentiary and was driving on a suspended license, Karpowski radioed other officers and told them to stop Chubs.

Detectives Mark Anthony and T. McAndrew responded to Karpowski's radio message and stopped appellant, whom Anthony knew was nicknamed "Chubs." Although appellant was not the man Karpowski referred to in his radio message, the detectives determined that he was driving on a suspended license.

Appellant was alone in the car with a dog the detectives described as "very upset with [the detectives' presence]" and "big enough" that the officers "didn't want to get too close to it." After confirming that appellant's license was suspended, Detectives Anthony and McAndrew arrested appellant, handcuffed him, and placed him in Detective McAndrew's vehicle. Due to a miscommunication, the detectives did not search appellant at that time. The detectives then called animal control and requested that they pick up the dog. Forty-five minutes later, after animal control arrived, the detectives drove to a hotel room where appellant had been staying. There, McAndrews

searched appellant's person and recovered crack cocaine from his jacket and $516 in cash from his pants pocket.

When asked at the hearing why appellant was arrested, Detective Anthony stated, "Just our prerogative, we chose to effect an arrest. Additionally, subsequent to that traffic stop, narcotics were eventually recovered." When asked why they did not release appellant on a summons, Anthony replied, "Well, we were still in the middle of the investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation."

Appellant moved to suppress on statutory and constitutional grounds, arguing the search of his person was tainted by the illegal arrest that preceded it. The arrest was illegal, he argued, because the detectives failed to release him on a summons pursuant to Code § 19.2-74(A)(1). The trial court denied the motion to suppress. Citing *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001), the trial court held the arrest violated neither the Fourth Amendment nor Virginia law permitting an officer to arrest for a misdemeanor committed in his presence. After hearing additional evidence, the trial court convicted appellant and sentenced him to five years in prison, one year and six months suspended. This appeal followed.

II.

ANALYSIS

Code § 19.2-74 provides, in pertinent part:

A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed

in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

Driving while one's license is suspended is a Class 1 misdemeanor. Code § 46.2-301(C). Therefore, in the instant case, Code § 19.2-74 required the detectives to issue appellant a summons and release him from custody upon securing his promise to appear unless: (1) appellant's offense was drunk driving under Code § 18.2-266 or a specifically exempted offense under Title 46.2, (2) appellant failed or refused to discontinue the unlawful act, (3)

the detectives believed appellant was likely to disregard the summons, or (4) the detectives reasonably believed appellant was likely to cause harm to himself or to another person. Code § 19.2-74; *see also West v. Commonwealth,* 36 Va. App. 237, 240-42, 549 S.E. 2d 605, 606-07 (2001). Absent proof of facts supporting application of one of these exceptions, a full custodial arrest, necessary to justify a search of the individual incident to arrest, was not permitted under the statute.

As the United States Supreme Court explained in *Knowles v. Iowa,* 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), upon which appellant relies, the Fourth Amendment also places limitations on searches conducted incident to issuance of a citation. In *Knowles,* 525 U.S. at 114, 119 S. Ct. at 486, an Iowa police officer stopped Knowles for speeding and, as permitted by statute, exercised his discretion to issue Knowles a citation rather than arrest him. After issuing the citation, the officer conducted a full search of Knowles's car, found a bag of marijuana and a "pot pipe" under the driver's seat, and arrested Knowles for offenses related to his possession of that contraband. *Id.* The Supreme Court considered whether conducting a full search of Knowles's vehicle pursuant to the issuance of a traffic citation was consistent with the Fourth Amendment and concluded that it was not. *Id.*

According to the Supreme Court, "two historical rationales [exist] for the 'search incident to arrest' exception [to the Fourth Amendment]: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id.* at 116, 119 S. Ct. at 487. The Court determined in *Knowles* that neither rationale was present and refused to extend the

"search-incident-to-arrest" exception to permit searches incident to the issuance of citations. *Id.* at 118-19, 119 S. Ct. at 488. The Court held that "officers have other, independent bases to search for weapons and protect themselves from danger," including the ability to "perform a 'patdown' of [the detainee] upon reasonable suspicion that [he] may be armed and dangerous." *Id.* at 117-18, 119 S. Ct. at 488 (citing *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

The Virginia Supreme Court addressed a similar issue in *Lovelace v. Commonwealth,* 258 Va. 588, 522 S.E. 2d 856 (1999). Lovelace and several other men were drinking beer while standing in the parking lot of a convenience store known to be an "open air drug market." *Id.* at 591, 522 S.E. 2d at 857. Officers in the area saw a beer bottle fly through the air but did not see who threw it. *Id.* One officer testified that the bottle came from the area where Lovelace was standing. *Id.* Lovelace and the other men were ordered to lie face down on the ground. *Id.* An officer approached Lovelace and asked him his name. *Id.* Lovelace identified himself but remained silent when the officer asked him whether he had any drugs or guns. *Id.* The officer proceeded to "pat down" Lovelace. *Id.* In Lovelace's pocket, he felt something like a plastic bag with lumps in it, but he did not know what was in the bag. *Id.* at 591-92, 522 S.E. 2d at 857. The officer nevertheless reached in Lovelace's pocket and retrieved the bag. *Id.* at 592, 522 S.E. 2d at 857. The substance was later identified as crack cocaine. *Id.*

In reversing Lovelace's conviction, the Court said:

> *Knowles* is applicable. . . . The initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of

> a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him. After *Knowles,* an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.
>
> Nor do we believe that Code § 19.2-74(A)(2) contemplates a custodial situation equivalent to an actual custodial arrest. Under that statute, a suspect is detained, or in the custody of the police officer, only long enough for the officer to take down the name and address of the person and issue a summons. One of the reasons that the *Knowles* Court did not extend the *Robinson* "bright-line rule" to a "search incident to citation" was because the duration of the encounter between a police officer and a defendant is "relatively brief" when the officer issues a citation. Thus, the threat to officer safety is less.

Id. at 596, 522 S.E. 2d at 860; *see also West,* 36 Va. App. 237, 549 S.E. 2d 605; *Rhodes v. Commonwealth,* 29 Va. App. 641, 513 S.E. 2d 904 (1999) (*en banc*).

The United States Supreme Court subsequently revisited *Knowles,* holding in *Atwater,* 532 U.S. at 354, 121

S. Ct. at 1557, that an officer effecting a custodial arrest for a misdemeanor traffic offense may search the arrestee without violating the Fourth Amendment. However, we noted in *West* that the Court reached this conclusion in the context of a state statute that expressly authorized a custodial arrest in such circumstances and gave the officer the discretion to issue a summons in lieu of effecting an arrest. *West,* 36 Va. App. at 242 n. 2, 549 S.E. 2d at 607 n. 2. Because the statute at issue in *Atwater* was significantly different from Virginia's, we held in *West* that the ruling in *Atwater* "does not apply in this case." *Id.* We then applied *Knowles* to hold unconstitutional the search of West conducted while he was handcuffed and under arrest for a citation-only offense. *Id.* at 240-42, 549 S.E. 2d at 606-07. Thus, we concluded in *West* that the holding in *Atwater* had no effect on the holding of *Knowles* that an officer who conducts a search pursuant to issuance of a summons violates the Fourth Amendment. *See id. Atwater* did not address the impact of the Fourth Amendment on a search incident to a custodial arrest for a misdemeanor offense effected in violation of a state statute authorizing only the issuance of a summons.

Here, rather than searching pursuant to issuance of a summons as in *Knowles,* the detectives arrested appellant and searched him incident to that arrest. Appellant contends that arrest violated Code § 19.2-74 and the United States and Virginia Constitutions and, thus, that the fruits of the accompanying search must be suppressed. Ordinarily, a statutory violation does not require the suppression of evidence obtained as a result of that violation "'absent an express statutory provision for suppression.'" *Janis v. Commonwealth,* 22 Va. App. 646, 651, 472 S.E. 2d 649, 652 (quoting *Troncoso v. Commonwealth,* 12

Va. App. 942, 944, 407 S.E. 2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc,* 23 Va. App. 696, 24 Va. App. 207, 479 S.E. 2d 534 (1996). However, in light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, we now conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment.[1] *Knowles* holds that if an officer, exercising his discretion as permitted by statute, chooses only to issue a citation rather than to effect a full arrest, a search incident to issuance of that citation is unconstitutional. We see no reason to reach a different result when it is the legislature that has

---

[1] The Virginia Supreme Court's recent language in an order affirming this Court's judgment in *Hunt v. Commonwealth,* 42 Va. App. 537, 592 S.E. 2d 789 (2004) (*en banc*) (affirmed without opinion by an evenly divided court), neither compels nor supports a different result. *Hunt v. Commonwealth,* No. 040614 (Va. Oct. 8, 2004). The Supreme Court held that Hunt did not preserve for appeal his claim that the search at issue violated his constitutional rights and affirmed based *solely* on his statutory claims:

> [Defendant's argument] was inadequate to preserve the *constitutional* issue for appeal.
>
> The Court also concludes that the Court of Appeals did not err in affirming the circuit court's rejection of the defendant's *statutory* arguments in support of his motion to suppress. Assuming, without deciding, that a violation of Code § 19.2-74 occurred, the defendant failed to establish that he was entitled to suppression of the evidence obtained as a result of the search. In the absence of a violation of a defendant's constitutional rights, the remedy of exclusion of evidence is not available for a statutory violation.

Hunt, slip op. at 1-2 (citation omitted) (emphasis added). Thus, the Supreme Court's order in *Hunt* actually supports our conclusion that a statutory violation rising to the level of a constitutional violation requires suppression.

concluded that, absent additional facts, only a citation should be issued for a particular offense.

Although *Knowles* did not expressly address this scenario, neither *Knowles* nor *Atwater* precludes this approach, and we hold that exclusion, under the facts of appellant's case, is a logical and necessary extension of the decision in *Knowles.* The Virginia Supreme Court intimated as much in *Lovelace* when it observed "The fact that the officers could have issued only a summons for the alcohol-related offense [under the relevant state statute] also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him." 258 Va. at 596, 522 S.E. 2d at 860. Where a statute authorizes only the issuance of a citation for certain minor offenses, pursuant to which a full search would be unconstitutional under *Knowles,* to hold admissible the fruits of a search, conducted by an officer who effects a full custodial arrest under circumstances clearly not permitted by statute, would yield inconsistent results and would be fraught with the potential for abuse. Any officer so desiring could intentionally effect a full custodial arrest contrary to clearly established state law in order to avoid running afoul of *Knowles,* thereby placing the search beyond the power of the court to review. *Cf. Crosby v. Commonwealth,* 6 Va. App. 193, 200-01 & n. 9, 367 S.E. 2d 730, 735 & n. 9, 4 Va. Law Rep. 2341 (1988) (holding existence of probable cause and exigent circumstances may justify warrantless entry of residence so long as police are "not . . . responsible for creating their own exigencies").

We recognize that, under appropriate circumstances, the good faith exception to the exclusionary rule permits the admission of evidence obtained by an officer mistaken

about the law. *See, e.g., United States v. Gould,* 326 F.3d 651, 659-60 (5th Cir. 2003). However, the burden rests on the government to prove good faith. *See, e.g., United States v. Brunette,* 256 F.3d 14, 17 (1st Cir. 2001). Here, the Commonwealth made no argument that the arresting officers misperceived the law. Further,

> the exception is not devised for the unlawful conduct of *all* officers who mean well. The good faith belief must be grounded in *objective* reasonableness. The mistake of an operative fact or an error of technical nature may not bar admission of evidence. [Circumstances are different where the mistake is] on a basic point of established law. To extend the exception so far as to allow evidence of a clearly unlawful warrantless search . . . would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule.

United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1986) (citations omitted) (emphases added). When Detectives Anthony and McAndrew encountered appellant on February 20, 2003, both the relevant provisions of Code § 19.2-74 and the Supreme Court's 1998 holding in *Knowles* were established law, and their misapplication of that law was not objectively reasonable.

Applying these principles to the facts of this case, we hold the search was unconstitutional because the Code made clear that, absent additional facts, the detectives were required to issue appellant a summons for the misdemeanor offense of driving on a suspended license. *See* Code § 19.2-74; Code § 46.2-301 (providing that driving while one's license is suspended is a Class 1 misdemeanor). The Commonwealth argues only that the police

had "reason to believe that the unlawful activity would not cease had they released [appellant] on a summons" because appellant was alone in the car with an animal "that could not be easily contained" and because "no one was available to take [appellant] or his dog from the scene." The Commonwealth thus argues that Code § 19.2-74 permits an arrest when the officers had "reason to believe that the unlawful activity would not cease had they released [appellant] on a summons." The Commonwealth, however, misapprehends the appropriate question under the statute. The trial court must determine whether the facts establish that appellant failed or refused to discontinue the unlawful act; whether the police had reason *to believe* appellant would fail or refuse to discontinue the unlawful act is immaterial. *Cf. Fox v. Commonwealth,* 43 Va. App. 446, 449-50, 598 S.E. 2d 770, 771 (2004) (discussing the standard to be applied in evaluating the applicability of exceptions (3) and (4)). That appellant was alone in the car with his dog and no one else was present to transport him from the scene do not establish that he failed or refused to discontinue the unlawful activity. No other evidence bearing on the question was introduced, and the trial court made no finding that appellant attempted to drive his car again after the initial stop.[2] *See Lovelace,* 258 Va. at 596, 522 S.E. 2d at 860 ("Only if Lovelace had failed or refused to discontinue the unlawful act could the officer

---

[2] The trial court denied the motion to suppress on the ground that the United States Supreme Court's decision in *Atwater* permits police officers to make an arrest for a misdemeanor traffic offense committed in their presence. However, as discussed *supra* in the text, we have held that *Atwater* is inapplicable to a case such as the instant one because Code § 19.2-74 does not provide the officer with discretion to make an arrest, as did the statute at issue in *Atwater. See West,* 36 Va. App. at 242 n. 2, 549 S.E. 2d at 607 n. 2.

have effected a custodial arrest and taken the defendant before a magistrate. However, there is no evidence in the record that Lovelace acted in such a manner." (citation omitted)).

We dealt with similar facts in *West*. In that case, a police officer observed West execute a turn in his car without using a signal. *West,* 36 Va. App. at 238, 549 S.E. 2d at 605. West subsequently parked his car, at which time the officer approached and asked to see West's license. *Id.* West informed him that he did not have a license, and the officer confirmed he was not licensed to drive. *Id.* He then handcuffed West, told him he was under arrest "for driving without a license," and began filling out a summons. *Id.* While filling out the summons, the officer noticed a bulge in West's shoe. *Id.* The officer searched the shoe and recovered crack cocaine. *Id.* We held that the cocaine should have been suppressed because the officer did not have authority to conduct the search where the evidence failed to establish that one of the exceptions to Code § 19.2-74 applied. *Id.* at 242, 549 S.E. 2d at 607. Specifically addressing the failure of the evidence to establish the applicability of the second exception, we stated that West "stopped the car before [the officer] approached him, and [the officer] had already started the paperwork to have the car towed. Therefore, [West] ceased the unlawful behavior." *Id.* at 240, 549 S.E. 2d at 606. Because West had ceased the unlawful behavior and because there was no evidence that he had failed or "refused to discontinue his unlawful acts," we held that the second exception did not apply and that his detention was illegal. *Id.* at 242, 549 S.E. 2d at 607.

Here, appellant ceased the unlawful activity of driving on a suspended license when the detectives stopped him,

and no evidence was introduced establishing that he failed or refused to discontinue the unlawful act. We conclude that the evidence in the instant case fails to establish the applicability of an exception to Code § 19.2-74(A)(1). Accordingly, appellant's arrest violated Code § 19.2-74, under which only issuance of a citation was authorized, and the evidence obtained as a result of the search, which was, in effect, conducted pursuant to issuance of a citation, should have been suppressed as fruit of the poisonous tree. *See Wong Sun v. United States,* 371 U.S. 471, 485-86, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). For the foregoing reasons, we reverse and dismiss the indictment.

Reversed and dismissed.

DISSENT BY: Annunziata

DISSENT:

Annunziata, J., dissenting.

I agree with the majority that Moore was arrested in violation of Code § 19.2-74. However, I cannot concur in the judgment to reverse. I would hold that, because Moore was placed under full custodial arrest supported by probable cause to believe a criminal offense was committed, Moore's arrest did not violate the United States Constitution. The exclusionary rule therefore does not apply, and Moore's conviction should be affirmed.

The evidence in this case establishes beyond dispute that Moore was placed under a full custodial arrest supported by probable cause that a criminal offense had been committed. After stopping Moore in his vehicle, an officer on the scene determined that Moore's driving license was suspended. Thus, the police had probable cause to believe that Moore was driving on a suspended license, a misdemeanor

violation of Code § 46.2-301(C). Moore was subsequently placed in handcuffs, made to wait forty-five minutes by his car until animal control arrived, and then transported to his hotel room.

I.

Because Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 149 L. Ed. 2d 549, 121 S. Ct. 1536 (2001) (holding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, *without violating the Fourth Amendment,* arrest the offender" (emphasis added)); *see also Penn v. Commonwealth,* 13 Va. App. 399, 407, 412 S.E. 2d 189, 194, 8 Va. Law Rep. 1518 (1991) (holding that "probable cause is the standard for testing the constitutional validity of an arrest").

Furthermore, it is clear that the Fourth Amendment to the United States Constitution is not violated as a result of a state law violation. The principle that state law is not relevant to a determination of whether the Fourth Amendment is violated, and thus whether the concomitant exclusionary rule is implicated, is firmly rooted in jurisprudence. *See California v. Greenwood,* 486 U.S. 35, 43, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (1988) (holding that evidence obtained in violation of California law should not have been excluded under the Fourth Amendment because the Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth

Amendment depends on the law of the particular State in which the search occurs"); *see also Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002) (holding that "there is no federal right not to be arrested in violation of state law"); *United States v. Van Metre,* 150 F.3d 339, 347 (4th Cir. 1998) (holding that whether the arrest was "conducted in accordance with Tennessee state law is irrelevant to our analysis" of whether to suppress the evidence pursuant to the federal exclusionary rule); *United States v. Bell,* 54 F.3d 502, 504 (8th Cir. 1995) (holding the lower court erred by looking to state law to determine that the arrest was invalid, and thus excluding the evidence, because "[a]n arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause"); *United States v. Wright,* 16 F.3d 1429, 1437 (6th Cir. 1994) (holding that "the fact that the arrest, search, or seizure may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended . . . because the exclusionary rule is only concerned with deterring Constitutional violations"); *United States v. Walker,* 960 F.2d 409, 415 (5th Cir. 1992) (holding that "whether the Fourth Amendment has been violated is determined *solely* by looking to federal law on the subject" (emphasis added)); *Anderson v. Haas,* 341 F.2d 497, 499 (3d Cir. 1965) (evaluating civil rights claim and holding that whether an arrest violates the federal constitution requires reference to federal law and that it is "immaterial whether [the police officer's] conduct is legal or illegal as a matter of state law" (internal quotations omitted)); *Horne v. Commonwealth,* 230 Va. 512, 519, 339 S.E. 2d 186, 191 (1986); *Penn,* 13 Va. App. at 406, 412 S.E. 2d at 194.

Moreover, this Court has held that exclusion is not an appropriate remedy when a state statute is violated " 'absent an express statutory provision for suppression.' " *Janis v. Commonwealth,* 22 Va. App. 646, 651, 472 S.E. 2d 649, 652 (quoting *Troncoso v. Commonwealth,* 12 Va. App. 942, 944, 407 S.E. 2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc,* 23 Va. App. 696, 24 Va. App. 207, 479 S.E. 2d 534 (1996).[3] Code § 19.2-74 does not direct that evidence obtained in violation of its provisions must be suppressed. I would therefore find that the exclusion of evidence in this case is without legal support.

---

[3] Virginia has historically looked to the General Assembly to adopt legislative measures as a means of protecting constitutional rights under both the federal and state constitutions. *See, e.g., Hall v. Commonwealth,* 138 Va. 727, 733-34, 121 S.E. 154, 155-56 (1924); *Janis,* 22 Va. App. at 651, 472 S.E. 2d at 652. In *Hunt v. Commonwealth,* No. 040614, slip. op. at 1 (Va. Oct. 8, 2004), discussed *infra* in Part II, the Supreme Court apparently did not have the occasion to consider the policy implications of this legal principle and adopt a construction that gives import to the legislative purpose of the statue. *See Bazemore v. Commonwealth,* 42 Va. App. 203, 226, 590 S.E. 2d 602, 613 (2004). Among the more ostensible and troubling policy issues engendered by violations of Code § 19.2-74, and which inhere in finding that evidence seized in violation of state law may nonetheless be used to convict, are the absence of a remedy for such violations and the effective nullification of the statute's mandate. It is not difficult to see that, in the absence of an exclusionary rule, an officer desiring to conduct a search could effect a custodial arrest in clear violation of state law and place the fruits of that search beyond review. Such a result divests Code § 19.2-74 of import and effectiveness, creates a positive incentive for police to disregard the legislative mandate of Code § 19.2-74, and gives little effect to the legislature's "expressed . . . preference for the issuance of a summons in lieu of an arrest warrant for most misdemeanor cases by enacting Code § 19.2-74." *West v. Commonwealth,* 36 Va. App. 237, 239, 549 S.E. 2d 605, 605 (2001).

II.

That Moore was arrested based on probable cause is not a factor in the majority's calculus. Instead, the majority concludes that Moore was, "in effect," searched incident to a citation because Code § 19.2-74 does not permit a full custodial arrest. It cites *Knowles v. Iowa,* 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998), in support of the fiction it creates and does so in order to avail itself of the *Knowles* holding. In *Knowles,* a case originating in Iowa, a state statute gave the police the discretionary authority to either arrest or issue a citation for the minor traffic violation of speeding. *Id.* at 115. The Supreme Court held that a search conducted incident to the issuance of a citation violates the United States Constitution. *Id.* at 114. The majority in this case concludes that, because Code § 19.2-74 does not authorize an arrest and limits police discretion to the issuance of a summons, the search in this case can only be denominated as incident to the issuance of a citation, in which case the *Knowles* holding would require exclusion of the seized evidence. I cannot concur in this reasoning.

It is undeniable that the Supreme Court in *Knowles* noted the Iowa statutory provision permitting a police officer to issue a citation for speeding rather than effecting an arrest. *Id.* at 115. However, the majority places undue reliance on this factual distinction because the statutory authority to arrest had no bearing whatsoever on the decision. *See id.* at 114. The Supreme Court confined itself to determining "whether [a search incident to a citation] authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car," *id.,* and the question was answered in the negative. *Id.* ("We answer this question 'no.'"). A careful reading of *Knowles*

discloses not a single reference to the discretionary authority granted to the Iowa police force to arrest as a reason for the Supreme Court's conclusions. Rather, the critical fact for the Supreme Court was that the defendant *was not arrested* and, because the defendant was not arrested, that the "historic rationales" underlying the search incident to arrest exception were not present. *Id.* at 116-17 ("The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a *custodial arrest.*" (Emphasis added)). The Supreme Court's reasoning makes abundantly clear that the search incident to arrest exception applies *only* when an actual arrest takes place because *only* then are the historic rationales underlying the exception present. This reading of *Knowles* comports not only with the language of the opinion itself but also with prior Supreme Court precedent. *See, e.g., United States v. Robinson,* 414 U.S. 218, 235, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) ("It is the *fact* of the lawful arrest which establishes the authority to search . . . ." (emphasis added)). On the other hand, the majority's reading of *Knowles* requires the conclusion that the decision signified, *sub silentio,* a sea change in federal law.[4] *Cf. supra* Part I.

In the present case, we must address a question not addressed in *Knowles.* The facts establish that an arrest occurred, not that a citation was issued. The question formulated by those facts is whether an arrest that occurs in violation of state law also violates the Fourth Amendment to the United States Constitution, triggering the exclusionary rule.

---

[4] It has been six years since *Knowles* was decided, and no subsequent case has invested the *Knowles* holding with the meaning suggested by the majority.

We answered this question in the negative in *Penn*. In *Penn*, this Court considered whether to exclude evidence obtained by a police officer incident to an arrest that violated Code § 19.2-81, a statute granting police the authority to arrest for misdemeanors only when committed in their presence. *Penn*, 13 Va. App. at 401, 412 S.E. 2d at 190. We determined that the police officer's arrest of the defendant violated Code § 19.2-81 because the crime did not take place in the police officer's presence. *Id.* at 402, 412 S.E. 2d at 190. We affirmed the conviction, however, reasoning that, although the arresting police officer was not in the presence of the defendant when the crime was committed, the officer had probable cause to believe that a crime had been committed because he was informed of the crime by another police officer. *Id.* at 408, 412 S.E. 2d at 194. Because the officer had probable cause to believe the defendant committed a crime, we held that his arrest did not violate the Fourth Amendment and that the evidence obtained incident to the arrest could not be suppressed. *Id.*

Although this case arose under a different statute, Code § 19.2-74 rather than Code § 19.2-81, I perceive no principled distinction than can be made which would compel a result different from that reached in *Penn*. Indeed, nothing in Virginia case law interpreting Code § 19.2-74 requires a different result. To the extent the majority relies on Virginia cases to reach a different result, the reliance is misplaced; none of the cases cited involved a full custodial arrest of the defendant in violation of Code § 19.2-74, the circumstances presented here. In *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E. 2d 856 (1999), the defendant was not placed under custodial arrest. *Id.* at 592, 522 S.E. 2d at 857. The Court thus rejected "the Commonwealth's argument that the existence of probable

cause to charge Lovelace with drinking an alcoholic beverage in public allowed Womack to search him."[5] *Id.* at 596, 522 S.E. 2d at 860. In *West v. Commonwealth,* 36 Va. App. 237, 549 S.E. 2d 605 (2001), a search conducted immediately after the officer was "filling out the summonses" and before an arrest could be effected was not justified by the search incident to arrest exception. *Id.* at 240-42, 549 S.E. 2d at 606-07. Finally, in *Rhodes v. Commonwealth,* 29 Va. App. 641, 513 S.E. 2d 904 (1999) (*en banc*), we held that the search incident to arrest exception could not apply where the defendant was searched during a "non-custodial detention." *Id.* at 645, 513 S.E. 2d at 906.[6]

Because Moore's arrest was based on probable cause, I am compelled to conclude that his Fourth Amendment rights were not violated. In the absence of a violation of Moore's Fourth Amendment rights, the federal exclusionary rule cannot apply, and neither the statute nor Virginia

---

[5] In rejecting the Commonwealth's argument, the Supreme Court implicitly rejected the reasoning of our panel decision in *Lovelace,* which held that "[t]he Constitution does not require a full custodial arrest to permit a complete search of the arrestee" where probable cause to arrest exists. *Lovelace v. Commonwealth,* 27 Va. App. 575, 585, 500 S.E. 2d 267, 272 (1998); *see also Rhodes v. Commonwealth,* 29 Va. App. 641, 643 n. 1, 513 S.E. 2d 904, 905 n. 1 (1999) (*en banc*) (noting that our panel decision in "*Lovelace* is no longer a viable precedent").

[6] Despite the fact that Rhodes was not arrested, we commented in footnote 6 of the opinion that an arrest in violation of Code § 19.2-74 would be unconstitutional and, thus, would require exclusion. *Rhodes,* 29 Va. App. at 645 n. 6, 513 S.E. 2d at 907 n. 6. However, this statement was unnecessary to the decision and, as such, is dicta. In any event, the statement appears to be wrong in light of long-standing precedent from the United States Supreme Court, federal circuit courts of appeal, and Virginia courts, cited *supra.*

case law provides for an exclusionary rule.[7] Accordingly, I would vote to affirm Moore's conviction.

[7] In this regard, I find the Virginia Supreme Court's recent holding affirming this Court's decision in *Hunt v. Commonwealth*, 42 Va. App. 537, 592 S.E. 2d 789 (2004) (*en banc*) (affirming the defendant's conviction "without opinion"), to be instructive. In a memorandum, the Court noted the following:

> Assuming, without deciding, that a violation of Code § 19.2-74 occurred, the defendant failed to establish that he was entitled to suppression of the evidence obtained as a result of that search. *In the absence of a violation of defendant's constitutional rights, the remedy of exclusion of evidence is not available for a statutory violation.*

Hunt, slip. op. at 1 (emphasis added). To the extent the majority opinion interprets the Supreme Court's opinion in *Lovelace* as standing for the proposition that a search incident to an arrest that violates Code § 19.2-74 is constitutionally impermissible, the Supreme Court's order in *Hunt* stating that exclusion does not follow after such an illegal arrest indicates that *Lovelace* cannot be so interpreted.

REFERRED: PRE-SENTENCE INVESTIGATION REPORT

FIPS CODE: 740

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
HEARING DATE: JULY 23, 2003
JUDGE: HONORABLE MARK S. DAVIS

COMMONWEALTH OF VIRGINIA
V.
DAVID LEE MOORE, DEFENDANT
Offense Date: 02-20-03
SSN: XXX-XX-XXXX DOB: 10-28-74 SEX: M

FELONY ORDER CR03-0611

This day came the defendant, who appeared with his appointed attorney, Amy Chudzinski, the assistant public defender. Ali Sprinkle represented the Commonwealth.

Thereupon, the defendant was arraigned, and after being advised by his counsel pleaded not guilty to possession with intent to distribute cocaine (18.2-248), as charged in the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case. And the case having been heard, counsel for the accused moved to strike the Commonwealth's evidence, which motion, being fully heard, **was overruled**. At the conclusion of all the evidence, the defendant, by counsel renewed his previous motion, which motion **was overruled**.

And the Court having heard all the evidence and argument of counsel finds the defendant **guilty of possession with intent to distribute cocaine, as charged**. The defendant is referred for a presentence investigation and report. The Court directs the Probation Officer of this Court to thoroughly investigate and report to the Court as prescribed by law, and this case is continued to October 7, 2003 at 9:00 a.m. in the Portsmouth Circuit Court.

The Court certifies that the accused and his counsel were present in person at every stage of these proceedings.

The Court dispenses with the Rule 1:13 counsel endorsement requirement.

7-25-03 ENTER: /s/ Mark S. Davis
Date Mark S. Davis, Judge

FIPS CODE: 740

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF PORTSMOUTH
HEARING DATE: OCTOBER 7, 2003
JUDGE: HONORABLE MARK S. DAVIS

COMMONWEALTH OF VIRGINIA
V.
DAVID LEE MOORE, DEFENDANT

This case came before the Court for sentencing, the defendant, who appeared with his attorney, Amy Chudzinski, the public defender. The Commonwealth was represented by Ali Sprinkle.

On July 23, 2003 the Court found the defendant guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR03-0611-01	**possess with intent to distribute cocaine (F)**	**02-20-03**	**18.2-248**

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the

guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:
Incarceration with the Virginia Department of Corrections **for the term of five (5) years.**

This sentence shall run **consecutively** with all other sentences.

The Court **SUSPENDS** one (1) year and six (6) months of this sentence upon the following condition:

Supervised Probation. The defendant is placed on probation, upon release, to commence under the supervision of a Probation Officer **for one (1) year and six (6) months,** or unless sooner released by the Court or by the probation officer. The defendant shall comply with all the rules and requirements set by the probation officer. Probation shall include substance abuse screening, assessment, testing and/or treatment as prescribed by the probation officer.

Operator License. The defendant's privilege to drive or operate a motor vehicle is suspended for six (6) months.

Cost. The defendant shall pay the costs of these proceedings.

The accused was advised that he has a right to apply for an appeal from this conviction to the Virginia Court of Appeals, and that counsel would be appointed, if requested, and he noted an appeal at this time.

The Court dispenses with the Rule 1:13 counsel endorsement requirement.

Date 10-10-03 Enter: /s/ Mark S. Davis
Mark S. Davis, Judge

DEFENDANT IDENTIFICATION:
Alias: N/A
SSN: XXX-XX-XXXX DOB: 10-28-74 SEX: M

SENTENCING SUMMARY:

Total Sentence Imposed:	**FIVE (5)YEARS**
Total Sentence Suspended:	**ONE (1 YEAR AND SIX (6) MONTHS**